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88-1137

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner,

v.

MACK TRUCKS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether an employer may be excused from the otherwise applicable duty to exhaust contractual grievance and arbitration procedures with respect to a grievance filed by the union and currently pending in that procedure on the basis that the employer would have been contractually incapable of initiating the grievance procedure.

2. Whether a federal court may grant a prayer for declaratory relief and impose a collective bargaining agreement on an employer and a union while, at the same time, finding that no "meeting of the minds" was reached on a matter involving the entitlement to increased pension benefits for many employees.

3. Whether, in inquiring as to whether a "meeting of the minds" has occurred for purposes of contract formation, a federal court may examine the bargaining positions of the parties at the conclusion of the hearing or must examine the bargaining position of the parties at the time the contract was alleged to have been formed.

[Petitioner Reserves the right to argue the following question should certiorari be granted. Petitioner does not, however, urge the following question as a basis for the grant of certiorari.]

4. Whether the employer was prohibited from initiating grievances under the terms of the collective bargaining agreement at issue here.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (hereafter "UAW") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on September 12, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 856 F.2d 579 (3rd Cir. 1988), and is reprinted in the appendix hereto, App. 1a, *infra.* The October 11, 1988 Order Denying Petition for Rehearing En Banc to the Third Circuit is unreported and is reprinted in the Appendix hereto at App. 32a.

The decision of the U.S. District Court for the Eastern District of Pennsylvania (Edward N. Cahn, J.) is reported at 671 F. Supp. 1027 (E.D. Pa. 1987), and is reprinted in the Appendix hereto, App. 36a.

JURISDICTION

On July 14, 1987, Respondent Mack Trucks, Inc. (hereafter "Mack") initiated the present suit by filing an action for declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982) and Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) in Federal District Court for the Eastern District of Pennsylvania.

On October 9, 1987, the District Court issued an Order granting Mack's request for declaratory judgment. That Order is unreported, but is reprinted in the Appendix hereto at App. 54a. On October 26, 1987, the District Court issued its full Opinion which, consistent with the October 9 Order, granted Mack's request for declaratory relief.

On Petitioner UAW's appeals, the Third Circuit on September 12, 1988, entered a judgment and opinion affirming the District Court's Order and Opinion. Petitioner UAW then filed a timely Petition for Rehearing En Banc, which was denied on October 11, 1988. A copy of the Order Denying UAW's Petition For Rehearing En Banc is reprinted in the Appendix hereto, App. 32a.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 185:

> Suits by and against labor organizations
>
> (a) Venue, amount, and citizenship
>
> Suits for violation of contracts between an employer and a labor organization representing em-

ployees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF FACTS

1. The most recent collective bargaining agreement executed by the UAW and Mack Trucks has a stated duration of October 30, 1984 to October 20, 1987 (the "1984-1987 Agreement"). That Agreement contains detailed provisions regarding the procedures which must be followed in order to modify that Agreement or in order to replace that Agreement. Thus, Article 32 of the 1984-1987 Agreement provides, *inter alia*:

> (2) Negotiations pursuant to Section 1 above shall be conducted in accordance with the applicable provisions of subsections (a), (b) and (c) below and any new agreements between the parties resulting therefrom *shall not be binding or effective unless reduced to writing and signed by the parties designated in subsection (a), (b) and (c) below.*
>
> (a) Master Agreement: Amendments to this Master Agreement or new agreements affecting same or adding to same shall be negotiated by the Top Negotiating Committee of the UAW Mack Truck Council, International representatives of the Union and representatives of the Company, and shall be signed by the Corporate Director of Labor Relations of the Company, the members of the Top Negotiating Committee of the Council, and the Director of the UAW Mack Truck Department (A-875)[1]

* * * *

[1] Citations to the Appendix to this Petition will be in the form App. ——. Citations to the record below will be made by reference to the seven volume Joint Appendix filed with the Third Circuit and

> (3) Modification of Master Agreement During Life of Agreement: Modifications in this Master Agreement which occur during its term shall be negotiated by the parties set forth in Section 2(a) above *and shall be signed by those named in Section 2(a) above. Id.* (Emphasis supplied.)

In addition, the 1984-1987 Agreement contains a broad arbitration clause, providing that both parties shall be bound by any arbitral resolution of any dispute regarding the interpretation of that Agreement.

2. In late 1986—approximately *one year* prior to the expiration of the 1984-1987 Agreement—Mack requested that the UAW enter into negotiations with a view towards modifying the 1984-1987 Agreement prior to its expiration. These negotiations were conducted, first by various UAW local unions and then by the International Union UAW, in contemplation of a possible modification of the 1984-1987 Agreement during its term, and not merely for the traditional replacement of the 1984-1987 Agreement following its stated expiration.

The principal parameters of these negotiations involved Mack's requests for wage and benefit reductions, along with certain requested changes in applicable work rules which, in Mack's view, would increase productivity. In exchange for these proposed economic and productivity concessions, the UAW sought contractual provisions which would enhance the job security for its membership. These negotiations involved many other items as well. For example, either UAW, Mack, or both, sought various changes in certain pension benefits, holiday pay, early retirement benefits, subcontracting and "outsourcing" language, etc. Discussions continued, and intensified, through the spring of 1987.[2]

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will be in the form A—— (for exhibits) or T-1, October 2, 1987, p. — (for trial transcripts).

[2] During this time, the parties also had a dispute regarding Mack's announced intention to close one of its assembly plants in

3. In March of 1987—still seven months prior to expiration of the 1984-1987 Agreement—negotiations bogged down both because of the Winnsboro/Allentown dispute and because of outstanding economic issues. At that time, the parties agreed to retain the services of Mr. William Usery, a former Secretary of Labor, to assist in mediating the outstanding issues. The parties met with Mr. Usery several times in April of 1987, and negotiations became more focused upon the Winnsboro/Allentown disputes. During the meetings, the parties principally discussed the Allentown/Winnsboro issues and discussed only summarily and in broad outline the other economic issues such as wage concessions, pension changes, etc.

Finally, after several days of intensive negotiations, the parties resolved to "carve out" the difficult disputes regarding the Winnsboro/Allentown issues, and to allow those disputes to be resolved by expedited arbitration proceedings. Although the vast majority of the negotiations prior to that "carve out" of the Winnsboro/Allentown issue on April 22 had involved only the Winnsboro/Allentown issue itself, the parties bargained for only an additional ten hours—through the night of April 22-April 23—regarding all the other outstanding economic issues. No written documents were exchanged (let alone initialed or signed) during this all-night ses-

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Allentown, Pennsylvania, and transfer that assembly work to its new plant under construction in Winnsboro, South Carolina. It was the UAW's position that (i) the closing of the Allentown plant was prohibited during the term of the 1984-1987 Agreement, (ii) the 1984-1987 Agreement required that Mack allow its employees preferential hiring rights at the new Winnsboro facility, and (iii) the terms of the 1984-1987 Agreement would be automatically applied at the Winnsboro facility. UAW filed grievances regarding these claims on February 25, 1986 and October 1, 1986, but Mack interposed several procedural defenses and refused the UAW's repeated requests for expedited arbitration. These issues therefore remained unresolved during the spring of 1987.

sion. Following this session, however, the parties believed that they had resolved their differences and had reached the basis for a new accord. The parties, in the presence of Mr. Usery, then shook hands.

Within a few days after the April 23 bargaining session, the parties exchanged written drafts of their understanding of the substantive terms of the tentative accord reached on April 23. Mack's version was transmitted to the UAW on April 29; the UAW's version was sent to Mack on May 1.

In addition, each local union soon thereafter conducted ratification meetings, allowing its membership to voice its opinion on the major features of the tentative accord. For that purpose, each local union developed documents describing the nature of the tentative accord for distribution to its membership. In addition to setting forth in summary fashion certain terms of the tentative accord, those documents stated "[i]t is important to realize that the Agreement is tentative in nature. It is subject to writing and finalizing contract language." (A-172, A-825) In addition, the ballots distributed to UAW members stated specifically that the tentative agreement was "[s]ubject to acceptance of contract language by your UAW Master Negotiating Committee." (A178-A-179) Ratification was achieved in three of the four local unions involved.

The day following the ratification votes, a press conference was held at which representatives of Mack and the UAW spoke, as well as Mr. Usery and Governor Casey of Pennsylvania. Although the April 23 tentative accord was several times referred to as the "New Agreement" during the course of that press conference by all of the parties involved, several colloquies indicate that much work remained to be done in order to reach agreement on specific contractual language incorporating the broad outlines of the tentative accord.

On May 8, only one week after the exchange of initial drafts, UAW communicated to Mack that those documents indicated "glaring differences" and that "[a]ll differences must be resolved before there is final and binding settlement." (A-2005)

During May and early June, many terms remained unresolved. The parties, on June 2, again called in Mr. Usery in an attempt to identify and resolve the then-outstanding issues. During this period, Mack did not implement any of the terms discussed in the April negotiations, but instead continued to abide by the 1984-1987 collective bargaining agreement. To facilitate the meeting on June 2 with Mr. Usery, Mack prepared a document entitled "Subject Areas Of Disagreement." (A-2000-A-2004; T-2, October 5, 1987, p. 26) That document identified 22 areas—many containing several substantive aspects—in which there remained "disagreement."

Following the June 2 meeting, additional corresponence was exchanged, but no resolution was reached. Additional meetings were held on June 11 through 13. During the course of those meetings, officials of the International Union, UAW, learned for the first time that Mack had recently unilaterally implemented certain aspects of its understanding of the April discussions. During those June 11-13 meetings, UAW informed Mack that "if [they] implement it, it's at [their] own peril." (T. 2, October 5, 1987, p. 35)[3]

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[3] Arbitral resolution of the Winnsboro/Allentown issues did not occur until issuance of an arbitration award on June 22, 1987. At that point, UAW and Mack were endeavoring the reach agreement regarding many outstanding issues discussed in the efforts to modify the 1984-1987 Agreement. In the present suit, Mack argued, and the District Court held, that the UAW's dissatisfaction with the Winnsboro arbitration award poisoned UAW's attitude and caused a breakdown in the negotiating process. The UAW had, however, noted "glaring differences" in the bargaining positions of the

Additional correspondence was sent between the parties during June and early July, and still no resolution was achieved. On July 6, UAW wrote Mack that, in the two and one-half months since the April 23 meeting, the parties had been unable to reach agreement and that, barring resolution of the outstanding disputes by July 15, the UAW would be forced to conclude that the attempt to modify the 1984-1987 Agreement had been unsuccessful because no agreement on several substantive issues had been achieved.

During July, the UAW also filed a grievance regarding Mack's partial unilateral deviation from the terms of the 1984-1987 collective bargaining agreement which, by its terms, did not expire until October 20. (A-2007) Mack submitted an answer to that grievance pursuant to the grievance procedure stating that Mack's deviation from the 1984-1987 Agreement was justified by the fact that a "new agreement" had been achieved. (A-2008)

While the grievance described above remained pending, Mack filed, on July 14, its complaint in federal district court seeking a declaratory judgment that a "new agreement" existed between the parties.

During October, the district court held several days of trial. During the course of the trial, the district court asked Mack to prepare and submit a document reflecting its understanding of the "new agreement." That document also indicated those areas which Mack believed to be still in dispute. Following submission of that document by Mack, additional hearings were held during which the district court inquired of counsel regarding those items which Mack indicated remained in dispute.

Many issues remained unresolved, and the colloquies between the district court and counsel for Mack and

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parties well in advance of UAW's receipt of the Winnsboro arbitration award.

In any event, the UAW's motives for concluding—on July 15, 1987—that further negotiations would be fruitless is not relevant to the legal issues presented here.

UAW are lengthy. For example, discussions had occurred in April regarding Mack's potential commitment to spend $100 million in capital improvements at its plant in Hagerstown, Maryland, and $22 million at its plant in Macungie, Pennsylvania. In the exhibit produced at the district court's request, Mack proposed a "capital commitments" letter indicating that Mack would spend "an amount between $45 million and $100 million" in capital improvements. After commencement of the trial, and in response to concerns raised by the District Court Judge, Mack sent the UAW a new proposed letter indicating Mack's commitment to in fact spend the full $100 million at Hagerstown. (T. 1, October 1, 1987, p. 80-81; T. 2, October 9, 1987, p. 47-48) In addition, in response to inquiries from the District Court, the parties discussed at length the remaining differences in such areas as (i) celebration of Martin Luther King, Jr. Day;[4] (ii) language restricting Mack's ability to outsource and subcontract bargaining unit work; (iii) provisions of the special early retirement benefit program; and (iv) eligibility for certain "step increases" in existing pension benefits.

Following the hearing, the District Court granted Mack's declaratory judgment request and held that a new contract had been formed. The district court further informed the parties that the substance of that new contract was to consist of certain portions of the exhibit submitted by Mack, certain portions of documents generated by the UAW, and, on some issues, language set forth in the district court's opinion itself. Finally, the district court specifically found that no "meeting of the minds" was achieved regarding eligibility for the step increases in certain pension benefits, and the district court—while imposing a contract containing a no-strike clause with a five and one-half year duration—ordered

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[4] Uncontradicted testimony indicated that this issue was a *sine qua non* of the UAW's agreement. And yet, Mack did not accede to the UAW's demand on this issue until the last day of testimony.

the parties to "negotiate this issue in good faith." (App. 52a)

Following the UAW's appeal, the Third Circuit affirmed the District Court's order. After concluding that the District Court enjoyed jurisdiction over this case pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and that such jurisdiction was not preempted by the primary jurisdiction of the National Labor Relations Board, the panel held that Mack was entitled to immediate judicial relief despite the pendency of the UAW's grievance on the question of whether a "new agreement" had been achieved. The Third Circuit further found that the district court did not err in imposing an agreement (along with a no-strike clause) despite its finding that no meeting of the minds had occurred on the pension benefit step increase issue. Finally, the Third Circuit rejected the UAW's argument that the disputes remaining between the parties—even during the hearing before the district court—indicated that no "meeting of the minds" had been achieved during the April 23 "handshake session."

REASONS FOR GRANTING THE WRIT

I. EXHAUSTION OF CONTRACTUAL REMEDIES

1. Where parties to a collective bargaining agreement have established in that agreement a provision for non-judicial resolution of disputes, this Court has long held that such provisions should be given their intended effect and that parties to such an agreement may not seek judicial relief prior to exhausting those contractual procedures.

> The courts have jurisdiction to enforce collective bargaining contracts; but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute. *United Paperworkers v. Misco*, —— U.S. ——, 108 S.Ct. 364, 370 (1987)

As this Court has recently reiterated, this judicial preference for enforcement of agreements to resolve disputes privately has given rise to a strong presumption in favor of arbitrability.

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. *A.T. & T. Technologies v. Communication Workers*, —— U.S. ——, 106 S.Ct. 1415, 1419 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 574, 582-583)

2. The crux of the present dispute is whether the negotiations which culminated on April 23 had the effect of modifying the 1984-1987 Agreement. Prior to initiation of Mack's suit for declaratory relief, UAW had filed a grievance raising precisely this issue by accusing Mack of improperly deviating from the terms of the 1984-1987 Agreement. (App. 6a, n.2) In accordance with the grievance procedure, Mack filed an answer with the UAW stating that the company believed a "new agreement [to be] in effect." (A-2008) Before this grievance could be processed to resolution, however, Mack filed the instant suit seeking a declaratory order that the "new agreement" was in effect.

Despite the strong presumption in favor of arbitrability discussed above, the court below held that Mack need not arbitrate the present dispute although that dispute was already the subject of a grievance filed by the UAW. Instead, the Court below held that—because only the UAW and not Mack could *initiate* the grievance and arbitration procedure—Mack could obtain immediate judicial relief without allowing the UAW's grievance to be resolved through arbitration. Thus, the court below held that Mack was not obligated to await arbitral resolution of the present dispute, but could obtain immediate declaratory relief, because the grievance procedure set

forth in the 1984-1987 collective bargaining agreement was:

> "employee-oriented . . . and as such, the grievance procedures set forth in that Article apply solely to grievances by union members and not grievances by Mack. The district court could not have been deprived of jurisdiction purely on the basis of a grievance procedure aimed at resolving employee grievances." (App. 22a-23a)[5]

3. Two distinct lines of authority have emerged in the lower courts on the "recurring issue[] . . . [of] . . . whether the *company* is required to bring its claims to an arbitrator when the collective bargaining agreement establishes procedures which limit the initiation of arbitration solely to the union." *Lehigh Portland Cement Co. v. Cement, Lime, Gypsum and Allied Workers, et al.*, 849 F.2d 820, 822 (3rd Cir. 1988) [emphasis in original]. Thus, in certain cases, lower courts have held that a contractual provision which allows only the union—and not the employer—to initiate the grievance arbitration machinery is dispositive as to the employer's duty to exhaust that procedure. In other situations, lower courts have held that such a limitation does *not* excuse the employer's otherwise applicable duty to exhaust contractual remedies prior to seeking judicial relief. As we explain below, we believe that these two distinct lines of lower court authority have not yet been properly reconciled and that, in the present case, the court below erroneously concluded that Mack need not allow the grievance procedure

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[5] Mack may claim that the decision of the court below rests on an alternative ground, namely the court's observation that Article 32 covers only negotiations to "modify or amend" the 1984-1987 Agreement, and not to efforts to reach a "new" agreement. It is difficult to determine whether in fact the court below intended to base its decision in part on this observation. If so, however, such a holding is clearly an improper determination of the merits of a dispute (the scope of Article 32) which should be decided in the first instance by the arbitrator. *United Paperworkers v. Misco*, —— U.S. ——, 108 S.Ct. 364, 370 (1987).

to run its course merely because Mack was allegedly incapable of initiating that procedure.[6]

A. The first line of cases discussing "employee oriented" grievance procedure involves the exception to the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 104, announced by this Court in *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970). In *Boys Markets*, this Court crafted a narrow exception to the general federal policy prohibiting issuance of injunctions in labor disputes. Thus, this Court approved the issuance of an injunction prohibiting a strike which violated the no-strike clause of a collective bargaining agreement because that contract also provided for mandatory arbitration of the dispute underlying the strike. See *What Circumstances are Sufficient to Warrant Granting of Injunctive Relief Under Boys Markets Exception to Operation of Anti-Injunction Provisions of Norris-LaGuardia Act*, 66 A.L.R. Fed. 11. This Court was, however, careful to limit this exception to situations in which "both parties are contractually bound to arbitrate" the dispute giving rise to the strike. 398 U.S. at 254. Thus, in evaluating whether the *Boys Markets* exception is applicable, courts must consider whether the parties are in fact "bound to arbitrate" the dispute at issue.

In this context, several courts have held that the fact that the grievance procedure at issue is "employee oriented" does not excuse the employer from arbitrating

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[6] As noted in the Questions Presented, we also believe that the court below erroneously assumed that the grievance procedure here *could* in fact only be initiated by the UAW. Should certiorari be granted, we reserve the right to demonstrate that Mack was in fact allowed to initiate its own grievance should it choose to do so. But, as we demonstrate in the text, the "employee oriented" grievance procedure distinction should have no bearing on this case since the present dispute was already the subject of a pending grievance which would have been resolved through arbitration if not for Mack's premature efforts to interpose a judicial resolution. Since it should be immaterial here whether the arbitration clause was in fact "employee oriented," and since that issue is primarily factual, we have not urged that certiorari be granted on that basis.

grievances initiated by the union. These courts have therefore rejected the argument that an "employee oriented" procedure precludes application of the *Boys Markets* doctrine. In other words, even though the procedure may be "employee oriented," and may be capable of initiation only by the union, still both parties to the contract are "bound to arbitrate" disputes which are in fact capable of being processed through that procedure.

In *Avco v. UAW Local 787*, 459 F.2d 968 (3rd Cir. 1972), for example, the Third Circuit reversed a District Court which had refused to issue a *Boy Markets* injunction on the basis that the grievance procedure was "employee oriented." As the Third Circuit stated, *Boys Markets* "does not require that both parties be capable of initiating arbitration. In this case, the company is bound to arbitrate if the Union elects to pursue that remedy, and the Union is bound to arbitrate the dispute it desires to resolve rather than to resort to a strike." 459 F.2d at 972. Thus, the court there found the necessary mutuality of obligation to arbitrate—and to be bound by the results—and issued a *Boy Markets* injunction despite the fact that only the union—and not the employer—could initiate the grievance procedure. Several other cases have followed precisely this analysis in this setting. *Eaton Corporation v. Machinists*, 580 F.2d 254 (7th Cir. 1978); *Teledyne Wisconsin Motor v. UAW Local 283*, 530 F.2d 727 (7th Cir. 1976) [applying *Avco*, but holding that grievance procedure was not in fact mandatory on either union or employer and no injunction may therefore be issued]; *Monongahelia v. Local 2332 International Brotherhood of Electrical Workers*, 484 F.2d 1209 (4th Cir. 1973).

Thus, under all these cases, the inability of an employer to initiate the grievance procedure has not prevented the necessary mutuality of obligation to be "bound to arbitrate," and has therefore not been a bar to issuance of *Boys Markets* injunctions.

B. In another line of cases, however, lower courts have held that the presence of an "employee oriented" grievance procedure does in fact eliminate the otherwise applicable duty to arbitrate disputes. These cases have involved efforts by employers to obtain damages from a union which conducted a strike in violation of a no-strike clause. In these cases, relied on by Mack and the court below, courts have noted that the employer is contractually incapable of initiating a grievance concerning its belief that the strike was in violation of the contract, and have therefore allowed the employer to seek immediate judicial relief.

In *Lehigh Portland Cement v. Cement, Lime, Gypsum and Allied Workers*, 849 F.2d 820 (3rd Cir. 1988), for example, the court found that the grievance procedure was wholly "employee oriented" and the employer was simply unable to obtain arbitral resolution of its claim that the strike violated the contract. In that circumstance, the court held that the employer was free to commence judicial proceedings without first exhausting the contractual grievances procedures. Other courts have applied this analysis in strike damage situations, sometimes finding that the employer could in fact initiate grievances—and was therefore required to exhaust—and sometimes finding that the procedure was "wholly employee oriented"—and therefore excusing a failure to exhaust. *Ed Friedrich v. Local 780 IUE*, 515 F.2d 225 (5th Cir. 1975); *Faultless Division v. Local 2040 IAM*, 513 F.2d 987 (7th Cir. 1975); *Controlled Sanitation v. District 128 IAM*, 524 F.2d 1324 (3rd Cir. 1975), *cert. denied* —— U.S. —— 96 S.Ct. 1324 (1976); *Eberle Tanning v. Section 63L, FLM Joint Board*, 682 F.2d 430 (3rd Cir. 1982); *Affiliated Food Distributors v. Local Union 229*, 483 F.2d 418 (3rd Cir. 1973); *Boeing Co. v. UAW*, 370 F.2d 969 (3rd Cir. 1967).

4. While the lines of cases discussed above have arisen in somewhat different circumstances, the holdings of those cases have not been explicitly reconciled by the

lower courts. Thus, properly considered, the "employee oriented" nature of a grievance procedure is material *only* when that aspect of the contractual agreement would prevent the employer from receiving an arbitral resolution of the dispute at issue. Thus, the strike damage cases excuse a failure to exhaust because, in fact, exhaustion would be impossible. The employer in those cases simply has no way of obtaining arbitral resolution; the employer cannot file a grievance and the union is unlikely to do so. In the *Boys Markets* cases, in contrast, the dispute *could* have been arbitrated (i.e. the Union could have filed a grievance rather than strike), and—since both parties would be bound by the result of any such arbitration—the necessary mutuality of obligation is present despite the employer's inability to initiate the procedure.[7]

Understood in this way, the court below clearly erred in applying the strike damages line of cases to the present suit. In the present case, the dispute *was* in fact currently pending in the grievance procedure and *would have been* arbitrated if not for Mack's efforts to circumvent that procedure by seeking declaratory relief. This is *not*, therefore, a case in which arbitral relief was unavailable and a failure to exhaust was therefore excusable. The court below thus had no cause to apply the "employee oriented" grievance procedure doctrine developed in the strike damage cases discussed above. Properly understood, those cases establish only that an employer which is incapable of obtaining arbitral resolution of a particular dispute cannot be faulted for seeking judicial relief prior to exhaustion of the arbitration mechanism. In the present case, in contrast, arbitral relief was not only available but was, in fact, imminent.

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[7] The courts below have thus far been unable to articulate this rationale for the difference between these two lines of cases. Apart from the other reasons set forth herein for granting the Writ of Certiorari, the Court may want to grant the Writ here to assist the lower courts in properly articulating this analysis.

Here, in fact, the UAW did precisely what the *Boys Markets* cases mandate: filed a grievance. But, instead of being allowed to process that issue through the contractual grievance machinery, the court below has allowed Mack to circumvent that procedure by obtaining immediate declaratory relief on the question at issue.

The error of this holding can be vividly demonstrated by considering its implications. If the pendency of a union-filed grievance does not trigger a duty on the part of an employer to await arbitral resolution of the dispute, the employer's agreement to arbitrate may be freely avoided. One need only consider a typical discharge arbitration. In these situations, the employer discharges an employee for disciplinary reasons. The union then files a grievance concerning the discharge. If the opinion below is allowed to stand, an employer wishing to avoid arbitral resolution of that dispute need only file an action for declaratory judgment regarding its alleged "right" to discharge the employee. In response to such a suit, the union would seek dismissal on the ground that the grievance procedure had not been exhausted. Under the reasoning of the court below, however, if the employer could demonstrate that the grievance procedure is "employee oriented," the employer would be excused from its duty to arbitrate the dispute raised by the union-filed grievance. Such a result is clearly in conflict with well-established precedent and creates a conflict with those cases, discussed above, which excuse a failure to exhaust only when the employer is in fact prevented from obtaining arbitral resolution.

II. MEETING OF THE MINDS

The court below made two distinct errors in finding the "meeting of the minds" necessary for contract formation. As we set forth below, each of these errors presents a conflict with established authority and warrants review.

1. The court below affirmed a district court judgment imposing a five and one-half year collective bargaining agreement on UAW and Mack despite its finding that no "meeting of the minds" has been reached regarding eligibility for certain step increases in pension benefits.[8] Thus, in its misguided enthusiasm to avoid labor conflict by imposing a collective bargaining agreement, the court below put the parties in a completely untenable position: deprived of their economic weapons while at the same time ordered to bargain in good faith regarding an issue admittedly unresolved by discussions to date. In so holding, the court below has disregarded well-established principles of federal labor policy and has created an irreconcilable conflict with prior decisions of the National Labor Relations Board and this Court.

As early as 1941, this court recognized that the National Labor Relations Act, while imposing a duty to bargain in good faith, does not compel either employers or unions to enter into agreements against their will or guarantee that parties will not resort to economic action to enforce collective bargaining demands. *H.J. Heinz v. NLRB*, 311 U.S. 514 (1941). In *H.K. Porter v. NLRB*, 397 U.S. 99 (1970), this court in fact held that federal labor policy prohibits the imposition of

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[8] As part of the negotiations, Mack and the UAW discussed phasing in an increase in pension benefits. The question here is whether those increases apply to individuals who retired after January 1, 1987 or to those who retire after January 1, 1988. While, in the context of discussions involving many millions of dollars, the amount of money at stake in this issue is comparatively small, this question is clearly material. In fact, it is particularly material here because the planned phase-out of the Allentown operation will foreseeably lead to a large number of employees taking a voluntary early retirement in 1987. It was also undisputed that the Allentown employees ratified based on the representation that these increases would be available to employees retiring after January 1, 1987. If Mack is correct that eligibility for the increases vests only in employees retiring after January 1, 1988, *all* of those individuals would be forever prohibited from receiving these lifetime increases.

contractual terms on unwilling parties, even when those parties are found to have negotiated in bad faith. As this court stated, "[i]t is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, *leaving the results of the contests to the bargaining strengths of the parties.*" 397 U.S. at 107-108. (Emphasis supplied.)

In imposing the substantive terms of an agreement on the parties—while at the same time specifically finding that no meeting of the minds had occurred on a particular issue—the court below ignored these bedrock principals of federal labor policy.

To justify this result, the court below found that the step increase issue was not "material," "essential," or "operative."[9] Both lower courts and the NLRB have operated without guidance from this court as to what constitutes a "material" issue for this purpose, thereby precluding the necessary "meeting of the minds" for contract formation. Compare, *Bobbie Brooks, Inc. v. International Ladies Garment Workers Union*, 835 F.2d 1164 (6th Cir. 1987); and *Georgia Kraft Co. v. NLRB*, 696 F.2d 931 (11th Cir. 1983); vacated in part and remanded 464 U.S. 981 (1983) with *Interprint Co.*, 273 NLRB 1863 (1985). Review should be granted here so that this Court may assist the lower courts and the NLRB in formulating a consistent standard on this issue.

2. The decision below is also in conflict with well-established NLRB precedent regarding the effect of concessions and alterations in bargaining positions which take place under the supervision of judicial or agency authority. Thus, in *Interprint Co., supra*, an administrative law judge—like the district court here—cajoled the parties into resolving certain disputes which had remained outstanding at the commencement of the hearing. The NLRB held that such action was *not* relevant to the question of whether a "meeting of the minds" had

[9] As discussed *supra* at note 8, we disagree with this conclusion.

occurred during the collective bargaining negotiations prior to commencement of the hearing—the only question legally relevant. The question before the Board was whether the negotiations had produced a bargain, not whether the administrative law judge could cause further migrations of bargaining position or eliminate outstanding differences. This NLRB holding properly discourages administrative and judicial authorities from attempting to oversee the process of collective bargaining itself. See, *H.K. Porter, supra.*

The court below, however, endorsed precisely the sort of judicial supervision of the collective bargaining process by engaging in lengthy discussions with counsel for the parties regarding their willingness to further modify their collective bargaining positions with respect to the then-outstanding issues.[10] As the NLRB properly observed in *Interprint*, the question before the court or agency is *not* whether the parties can be cajoled into reaching agreement on particular issues. Rather, the only question properly before the court or agency is whether, as a matter of fact, the parties had reached the mutual and concrete understandings necessary to form a "meeting of the minds" and thereby form a contract during their

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[10] See, for example, the discussion of the various issues unresolved as of the commencement of the hearing, *infra*, p. 9.

The district court's over-zealous activism in this case has created another difficult problem for the parties: identifying the governing language on Mack's pledge to refrain from outsourcing, an obviously material issue. The district court has issued an Order and an Opinion which are internally inconsistent on this issue. Thus, the district court's October 9 Order purports to bind the parties to the job security language of the UAW's May 1 draft which was used in the Allentown ratification process (and which prohibits outsourcing of work associated with any replacement model which Mack may produce during the term of the imposed "agreement"). (App. 54a) The district court's October 26 Opinion, in contrast, binds the parties to the job security language set forth in the ratification documents used at the Hagerstown location (which does not cover replacement models, components or parts). (App. 52a-53a).

negotiations. The court below, therefore, has improperly intruded into the collective bargaining process and has created a conflict with well-established NLRB precedent in this area. For this reason, the Court should grant this Petition.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: January 9, 1989

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1650

MACK TRUCKS, INC.

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,
International Union, UAW,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil Action No. 87-4379)

Argued April 12, 1988

Before: HUTCHINSON, SCIRICA and
GARTH, Circuit Judges

(Filed September 12, 1988)

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OPINION OF THE COURT

SCIRICA, Circuit Judge.

This appeal requires us to consider the jurisdiction of a federal district court to determine the existence of a collective bargaining agreement. In so doing, we must also examine the relationship between the subject matter jurisdiction of the National Labor Relations Board ("the NLRB") and a district court.

Defendant International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW ("UAW") appeals from a district court judgment declaring valid and enforceable a collective bargaining agreement between plaintiff Mack Trucks, Inc. ("Mack") and the UAW. We must address three issues: (1) whether the district court had subject matter jurisdiction under Section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1982); (2)

whether a contractual grievance and arbitration procedure under a previous agreement barred judicial relief; and (3) whether the district court correctly found a meeting of the minds over the terms of the new agreement. For reasons that follow, we hold that the district court had jurisdiction to consider this action, together with the underlying issue of the existence of a collective bargaining agreement. We also hold that the grievance and arbitration procedure did not bar this suit. Finally, we will affirm the court's finding that the parties created a new collective bargaining agreement.

I.

Mack and the UAW were parties to a master collective bargaining agreement, effective from October 30, 1984, to October 20, 1987. This agreement ("the 1984 agreement") governed Mack employees in bargaining units represented by four local unions: Local 677 in Allentown and Macungie, Pennsylvania; Locals 171 and 1247 in Hagerstown, Maryland; and Local 229 in Somerset, New Jersey.

In late 1986, Mack and the local unions covered by the 1984 contract commenced preliminary negotiations on a new agreement. Mack desired wage reductions and guaranteed productivity increases. For its part, the UAW sought greater job security. Based on these general proposals, the parties began bargaining in early 1987 on a new collective bargaining agreement.

One of the most significant issues in the negotiations concerned the proposed closing of Mack's assembly plant 5-C in Allentown. In October, 1985, Mack had informed the UAW of its intention to construct a new asembly facility, the location then undetermined. The company assured the UAW that no existing plant covered by the 1984 agreement would be closed during the life of that contract. In January, 1986, Mack announced that the

new facility, which was to replace the Allentown assembly plant, would be built in Winnsboro, South Carolina. The Allentown facility was scheduled to close at the end of October, 1987, after the expiration of the 1984 agreement.

On February 25, 1986, the UAW filed a grievance at Allentown Plant 5-C, contending that the plant closing violated the 1984 Agreement. On October 1, 1986, the UAW submitted a second grievance at Plant 5-C, claiming that the UAW had a right to automatic recognition at the Winnsboro plant, that Mack was required to apply the 1984 agreement to Winnsboro, and that the agreement controlled the transfer rights of union employees to the new facility. After both grievances were denied at all steps, the UAW sought arbitration. At the time of the negotiations for a new labor agreement, arbitration of the Allentown/Winnsboro grievances had not yet been scheduled.

In early April, 1987, the parties agreed to hire former United States Secretary of Labor William Usery to mediate their dispute. At Usery's request, representatives of Mack and the UAW met in Crystal City, Virginia, on April 18, 1987. On the night of April 22, after reaching an impasse on the Allentown/Winnsboro disputes, the parties agreed to "carve out" those issues from the new agreement, to proceed to expedited arbitration of the Allentown/Winnsboro grievances on May 5 and 6, 1987, and to accept the arbitration decision as final and binding. Thereafter, Mack and the UAW continued negotiations on the remaining issues. At approximately 7:00 a.m. on April 23, representatives of both parties concluded the negotiations with what they termed a "handshake" session; that is, they shook hands with each other, with Usery, and his assistant, William Hobgood, and congratulated one another on reaching a new agreement. They also discussed the need to hold a ratification vote of UAW members before May 5, so that the agreement would be in effect by the date of the Allentown/Winns-

boro arbitration. That morning, Usery announced to the press that Mack and the UAW had reached a "tentative agreement." Transcript of Hearing at 54-55. Usery included the word "tentative" at the request of William Casstevens, vice-president of the UAW International, because the agreement still required approval by the UAW's Mack Truck Council, which represented local union members governed by the agreement,[1] and ratification by union members.

In order to inform the membership of the new agreement, local union officials prepared and distributed summaries of its relevant terms. On May 3, a majority of the UAW members covered by the 1984 agreement ratified the new agreement. In Allentown, it was ratified by a vote of 1362-303; in Hagerstown, 736-81; and in Somerset, 29-12. Although the employees at the Macungie facility did not vote on ratification of the new agreement, fewer than 100 union members were employed at that plant; therefore, a majority of Mack union employees voted in favor of ratification.

The following day, Pennsylvania Governor Robert P. Casey convened a press conference at Mack's headquarters in Allentown to announce the new agreement. At the press conference, Usery and Kim Blake, president of UAW Local 677, confirmed that the parties had reached a new agreement. On May 5 and 6, Mack and the UAW submitted the Allentown/Winnsboro grievances to arbitration before Arthur Stark, of the American Arbitration Association.

In the weeks following the ratification vote, the parties exchanged proposed contract language intended to reflect the terms of the agreement reached at Crystal City. They also met several times in order to prepare the agree-

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[1] At noon on April 23, 1987, Casstevens met with the Mack Truck Council, which voted unanimously in favor of Casstevens' recommendation to accept the agreement.

ment's specific language. During this period, Mack began to implement certain provisions of the new agreement, including wage reductions and the special early retirement benefits program. From their meetings with Mack in mid-June, the UAW officials learned of this implementation.

On June 19, Stark issued his award on the Allentown/Winnsboro grievances. He determined that the proposed closing of the Allentown facility did not violate the 1984 agreement and that the UAW was not entitled to automatic recognitiion at the new plant in Winnsboro. He also decided that under the 1984 agreement, certain employees affected by the closing of the Allentown facility had transfer rights to Winnsboro that superseded the rights of prospective employees hired to work at the new plant. At this point the parties had not completed memorializing the new agreement in a written document.

On July 2, the UAW filed a grievance alleging that Mack had unilaterally implemented modifications to the new agreement.[2] Four days later, the UAW wrote to Mack warning that, barring resolution of outstanding disputes and the execution of a document by July 15, the UAW would declare that there was no new agreement between the parties. At the same time, the UAW refused to complete the process of memorializing the agreement in writing. On July 10, the UAW stated in a letter to the company:

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[2] The grievance stated:

> The union protests the Company unilaterally implementing changes in the Master and Local current Agreement. On June 8, 1987, the company implemented changes in the current Agreement which only benefited them. The Company implemented changes on June 8, 1987, which did not reflect the understandings which we had reached with the Company.

App. at 2007.

> [T]here is not now, nor has there ever been, any agreement with the UAW-Mack Trucks Department to allow you to deviate from the terms and conditions of the October 1984 to October 20, 1987 [Agreements].

App. at 753.

On July 14, 1987, Mack filed suit in district court for a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982), and § 301(a) of the LMRA. The company asked the court to declare valid and enforceable a new collective bargaining agreement between the parties.[3] At the bench trial, Mack introduced into evidence its exhibit 80, prepared at the request of the district judge, as a summary of the parties' agreement reached on April 23 and of the unresolved disputes over contract language. In open court, the district judge questioned counsel for the parties in order to determine what disagreements remained and to resolve disputes over language. At the trial's conclusion on October 9, 1987, the judge issued an order declaring that a new collective bargaining agreement existed and

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[3] Specifically, Mack alleged:

> Mack needs a prompt declaration of the validity and enforceability of the April 23, 1987 Agreement in order to obtain the vital intangible benefit of the labor stability provided for by the April 23, 1987 Agreement and to avoid the substantial economic injury to Mack arising from the International Union's attempt to unilaterally repudiate the agreement.
>
> WHEREFORE, Mack respectfully prays that this Honorable Court enter an Order declaring that the April 23, 1987 Agreement with the International Union constitutes a valid and enforceable collective bargaining agreement, enjoining the International Union from taking any economic or other action inconsistent with the April 23, 1987 Agreement, and granting to Mack such other and further relief as may be deemed appropriate to enforce its rights, including an award of reasonable attorneys' fees and costs.

Complaint at 8-9.

that Mack's Exhibit 80, as modified during the courtroom discussion, represented the new agreement. On October 26, 1987, the court issued an opinion containing findings of fact and conclusions of law. *See* 671 F. Supp. 1027. This appeal by the UAW followed.

II.

As a threshold matter, we must determine whether the district court had subject matter jurisdiction to consider the issues raised in this case. In its opinion, the court concluded that it had jurisdiction pursuant to the Declaratory Judgment Act[4] and § 301(a) of the LMRA. Section 301 provides, in relevant part:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

The UAW raises two closely related arguments contesting the district court's judgment. First, the UAW contends that Mack's claim involves issues uniquely within the expertise of the NLRB, rather than a contract action within the district court's jurisdiction. Therefore, it maintains, the NLRB's exclusive authority over bargaining conduct preempts the district court from acting. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244, 245 (1959). Second, it argues § 301(a) cannot

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[4] The Declaratory Judgment Act has only a procedural effect. Although it enlarges the range of remedies available in federal courts, it does not create subject matter jurisdiction. Thus, a court must find an independent basis for jurisdiction before it can consider a declaratory judgment action. *See Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 351-52 (3d Cir. 1986).

confer jurisdiction on the district court because it authorizes courts to adjudicate only disputes over alleged violations of a collective bargaining agreement, not controversies over the actual existence of a contract.

In response, Mack contends that its claim is a straightforward contract action, which is broader than the type of matter generally preempted in favor of the NLRB. Alternatively, it maintains that because the UAW violated the new agreement by repudiation,[5] the district court properly held that it had jurisdiction over the claim. Alleging a contractual breach, Mack argues, is not a condition precedent to the court's jurisdiction under § 301 (a) to decide whether a contract existed. Finally, Mack contends that even if its contract violation claim might also constitute an unfair labor practice within the NLRB's domain, the court and the NLRB possess concurrent jurisdiction to decide the case. *See Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1977).

Because this appeal involves a question of law, we exercise plenary review. *See Medical Fund—Philadelphia Geriatric Center v. Heckler*, 804 F.2d 33, 36 (3d Cir. 1986).

A.

In order to resolve this dispute, we first must examine the interplay between the jurisdiction of the NLRB and of the federal district courts in labor cases. Under the preemption doctrine in labor law, state and federal courts must defer to the primary jurisdiction of the NLRB if a matter is arguably subject to section 7 or section 8 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169 (1982).[6] *Garmon*, 359 U.S. at 244, 245; *see*

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[5] Mack alleged in its complaint that the UAW attempted to repudiate the new agreement. The district court specifically found a breach by repudiation.

[6] Section 7 of the NLRA regulates the right of employees to organize and to engage in collective bargaining. 29 U.S.C. § 157. Section 8 prohibits employers and unions from committing unfair

also Longshoremen v. Davis, 476 U.S. 380, 381, 389-90 (1986). A primary reason for the preemption doctrine is "the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose . . . ." *Vaca v. Sipes*, 386 U.S. 171, 180-81 (1967). The doctrine reflects the congressional intent that matters of national labor policy be decided in the first instance by the NLRB. *See Garmon*, 359 U.S. at 244-45; *see also Longshoremen v. Davis*, 476 U.S. at 391.

This policy is especially important where Congress has granted the NLRB initial authority to decide issues such as representation, bargaining units, *see International Brotherhood of Elec. Workers, Local 532 v. Brink Const. Co.*, 825 F.2d 207, 211 (9th Cir. 1987), a party's status as an "employee" within the meaning of the NLRA, *see Iron Workers v. Perko*, 373 U.S. 701, 706 (1963), or union governance of its membership, *see Plumbers & Pipefitters v. Plumbers & Pipefitters*, 452 U.S. 615, 626 (1981). *See generally* American Bar Association, *The Developing Labor Law* 377-78 (2d ed., 3d supp. 1988) (listing areas of the NLRB's exclusive and primary jurisdiction). Those issues involve "considerations . . . largely of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole." *Marine Engineers v. Interlake Steamship Co.*, 370 U.S. 173, 180 (1962).

Nevertheless, the preemption doctrine "has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca*, 386 U.S. at 179. In § 301 of the LMRA, Congress "carved out" an exception to the

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labor practices, which are defined in that provision. 29 U.S.C. § 158.

NLRB's exclusive jurisdiction, by granting district courts jurisdiction over suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce. *Id.* The NLRB's primary jurisdiction does not preempt a court's jurisdiction over § 301 actions, even if the matter is arguably subject to § 7 or § 8 of the NLRA. In *Smith*, 371 U.S. at 197, the Supreme Court held:

> The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301.

Id.; *see also Farmer v. Carpenters Local 25*, 430 U.S. 290, 297 n.8 (1977) (§ 301 is a congressional exception to NLRB's exclusive jurisdiction under *Garmon*); *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16 (1974) ("[T]he *Garmon* doctrine is not relevant to actions within the purview of § 301 . . . .") (citations omitted)).

Thus, a district court retains independent jurisdiction to decide a case properly brought under § 301, even if the claim may also constitute an unfair labor practice under the NLRA. "The strong policy favoring judicial enforcement of collective-bargaining contracts was sufficiently powerful to sustain the jurisdiction of the district courts over enforcement suits even though the conduct involved was arguably or would amount to an unfair labor practice within the jurisdiction of the National Labor Relations Board." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 563 (1976); *see also Motor Coach Employees v. Lockridge*, 403 U.S. 274, 300 (1971). In *Smith*, for example, when a clause of a collective bargaining agreement specifically prohibited discrimination against union members, the fact that an action for breach of contract based on that provision could also constitute an unfair

labor practice claim under § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), did not destroy the court's jurisdiction over the contract suit. 371 U.S. at 200-01. In such a case, the NLRB and the court possesses concurrent jurisdiction. *See id.* at 197; *see also NLRB v. Strong*, 393 U.S. 357, 360 (1969).

B.

A labor case, therefore, can be within the concurrent jurisdiction of the NLRB and the federal courts, but it is within the NLRB's exclusive jurisdiction only if it involves an unfair labor practice that is not also covered by § 301(a). Thus, the NLRB's jurisdiction is "exclusive" only if there is no jurisdiction under § 301(a). On the other hand, a case is governed solely by § 301(a) only if it is not also an unfair labor practice. Under each jurisdictional scenario, the applicability of § 301(a) controls our inquiry.

The UAW, however, contends that we need not reach the § 301(a) issue in this case because Mack's suit is solely an NLRB matter, *i.e.*, not a contract claim, and is therefore within the NLRB's exclusive jurisdiction. *See* American Bar Association, *The* Developing Labor Law 377 (2d ed., 3d supp. 1988) ("Courts have recognized exclusive or primary Board jurisdiction in suits involving primarily representational matters and matters which are unfair labor practices under the Act as distinct from contractual issues."); *accord Local 3-193 Intern. Woodworkers v. Ketchikan Pulp Co.*, 611 F.2d 1295, 1299 (9th Cir. 1980) (union attempted to end run around the NLRB by characterizing its representation and bargaining unit claim as a contract action under § 301).

The UAW relies on the general proposition that the NLRB has authority to oversee and referee the process of collective bargaining. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970). Further, it contends that

Mack's claim implicates the NLRA's duty to bargain collectively, and in good faith, *see* §§ 158(a)(3), (a)(5), and the duty to reduce the terms of an oral contract to writing, *see* § 158(d).

We disagree. First, as we have noted, we cannot resolve the UAW's claim that Mack's suit is exclusively a NLRB matter without also determining that the suit is not a § 301(a) action. Thus, by adopting the UAW's exclusivity argument, our holding would necessarily reject Mack's claim that we have jurisdiction under § 301(a) to determine the existence of a contract. If, however, we hold that § 301(a) does cover Mack's suit, the *Garmon* preemption doctrine would not apply, and—even assuming Mack's claim also alleges an unfair labor practice—the NLRB and the court would possess concurrent jurisdiction. *See Smith*, 371 U.S. at 197.

Therefore, the NLRB's authority to supervise the collective bargaining process does not by itself preempt a federal court's jurisdiction to decide a § 301 contract dispute. Indeed, the NLRB has declined to exercise its concurrent jurisdiction over unfair labor practice questions when federal labor policy would best be served by judicial treatment. *See id.* at 198 n.6; *accord William E. Arnold Co.*, 417 U.S. at 18 (1974) ("The Board's practice and policy of declining to exercise its concurrent jurisdiction over arguably unfair labor practices which also violate provisions of collective-bargaining agreements for voluntary adjustment of disputes highlight the congressional purpose that § 301 suits in state and federal courts should be the primary means for 'promoting collective bargaining that [ends] with agreements not to strike.' ") (quoting *Lincoln Mills*, 353 U.S. at 453).

Second, we do not find that Mack's suit turns solely on violations of good faith bargaining, or the duty to execute an agreement, *see* §§ 158(a)(3), (5), (d), which would trigger the NLRB's exclusive jurisdiction. Mack's

complaint does not request that the union be ordered to exercise an agreement. *Compare NLRB v. New York-Keansburg-Long Branch Bus Co.*, 578 F.2d 472, 474, 479 (3d Cir. 1978) (union filed unfair labor practice charge alleging that employer had refused to sign an agreement that had been reduced to writing). Nor did Mack claim that the UAW negotiated in bad faith or failed to bargain. Rather, Mack seeks to enforce the validity of a contract. Although this claim may raise some unfair labor practice issues,[7] we must first determine whether § 301(a) grants federal courts jurisdiction to determine the existence of a collective bargaining agreement. If it does, our inquiry is complete because even if NLRB issues are implicated, the concurrent jurisdiction doctrine vests the district court with jurisdiction.

C.

In construing § 301(a), our starting point is the language of the statute. The precise meaning of "suits for violation of contracts" in § 301(a) is unclear, and Congress did not define it in the LMRA. The phrase could assume the existence of a valid labor agreement, refer only to suits for a breach of a specific contractual provision, or it could grant jurisdiction to resolve a dispute over whether the parties' conduct constituted the formation of a contract. That, of course, is the issue presented in this appeal.

Because the statutory provision is not free from ambiguity, we interpret § 301(a) in light of its legislative history, congressional intent, and underlying policies. *See Northern R.R. Co. v. Oklahoma Tax Comm'n*, 107 S.Ct.

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[7] To establish that the conduct at issue was "arguably" subject to the NLRA, the party asserting preemption based on the NLRB's exclusive jurisdiction "must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Longshoremen v. Davis*, 476 U.S. at 395.

1855, 1859-60 (1987) ("Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity."); *Offshore Logistics, Inc. v. Tallentine*, 477 U.S. 207, 220-22 (1986); *cf. Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 406 (1981) ("[I]t is clear that in fashioning federal [substantive] law under § 301(a) substantial deference should be paid to revealed congressional intention.") (citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 248-49 (1962)).

During the past three decades, the Supreme Court has thoroughly canvassed the policies and history underlying enactment of § 301(a). Although this legislative history has been described as "somewhat cloudy and confusing," *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 452 (1957), we believe Congress offered "a few shafts of light that illuminate our problem." *Id.*

First, Congress enacted § 301 to expand, not limit, the availability of forums for the enforcement of contracts made by labor organizations. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 508-09 (1962). Until passage of § 301, enforcement of labor agreements had been a task handled by state courts, *William E. Arnold Co.*, 417 U.S. at 20, even though many states had made "suits against labor organizations difficult or impossible." *Dowd Box Co.*, 368 U.S. at 510. Passage of the Act "represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process." *Id.* at 509. Critical to this goal was Congress' recognition in § 301 "of the vital importance of assuring the enforceability of such agreements" in the courts. *Id.*

Second, we find it instructive that the legislation originally proposed in Congress would have made the violation of a collective bargaining agreement an unfair labor practice, subject to NLRB jurisdiction, and also made it a § 301 contract violation, subject to federal court

jurisdiction. *Id.* at 510-11; *accord Lincoln Mills*, 353 U.S. at 452. "In conference, however, it was decided to make collective bargaining agreements enforceable only in the courts." *Dowd Box Co.*, 368 U.S. at 511. Congress intended that collective bargaining contracts should be enforceable, and that an aggrieved party should "have a right of action in Federal courts." *Lincoln Mills*, 353 U.S. at 453. Congress noted:

> Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.

H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947); *see also Plumbers & Pipefitters*, 452 U.S. at 626; *Dowd Box Co.*, 368 U.S. at 511; *Lincoln Mills*, 353 U.S. at 452-53. In addition, Congress made clear that

> [section 301] contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers . . . under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract.

93 Cong. Rec. 3656 (1947) (statement of Rep. Barden), *quoted in Lincoln Mills*, 353 U.S. at 456.[8] Thus, Congress designated the judiciary as the body charged with "assuring the enforceability of such agreements." *See Dowd Box Co.*, 368 U.S. at 509.

We have considered whether these legislative pronouncements might presume the existence of a valid agreement and thereby contemplate § 301 jurisdiction only when

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[8] Rep. Hartley, a co-sponsor of the bill, confirmed this interpretation. 93 Cong. Rec. 3657 (1947) (statement of Rep. Hartley), *quoted in Lincoln Mills*, 353 U.S. at 456.

the parties agree that a contract exists. This view, however, ignores Congress' broader concern that the courts —as opposed to the NLRB—be granted authority to decide disputes of a contractual nature. When, as here, a party seeks enforcement of a labor agreement, and the other party denies the contract's existence, the filing party's declaratory judgment action constitutes an "enforcement" action. Congress intended that contractual disputes be resolved by courts applying "usual processes of the law." H.R. Rep. 510 at 42. These principles of law apply equally to cases involving breach of an acknowledged contract and those involving a dispute over the agreement's existence.

Moreover, by declining to classify contract violations as an unfair labor practice under the Act, Congress determined that contract actions did not necessarily implicate the type of labor issues that mandated initial referral to the specialized expertise of the NLRB. Instead, Congress expressed a preference for judicial, as opposed to agency, resolution of contractual questions, and it recognized a declaratory judgment action as a proper means of obtaining this type of judicial relief.

The Court's decision in *Dowd Box Co.* supports our holding of jurisdiction. In *Dowd Box Co.*, the parties began contract negotiations before expiration of a labor agreement. They then signed a stipulation continuing the existing agreement and providing for wage increases and changes concerning holidays and vacations. The employer announced that it would honor the stipulation, but a few weeks later changed its mind. The employer contended that it had informed the union during negotiations that the employer's bargaining agents had acted without authority in negotiating the stipulated agreement. The union subsequently filed suit in state court, requesting "a judgment declaring that there existed a

valid and binding collective bargaining agreement . . . ." 368 U.S. at 504.[9]

The issue decided by the Supreme Court was whether § 301 divested state courts of jurisdiction in contract violation cases and thereby granted federal courts exclusive jurisdiction. *Id.* at 503, 506. The Court held that a state court could assert jurisdiction over a § 301 suit seeking a declaration that a contract existed, as long as it applied federal law. *Id.* at 511; *accord Teamsters Local, 174 v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962) (inconsistent state law must give way to substantive federal labor law). The Court's analysis recognized that a suit seeking a declaration that a contract existed fell within the ambit of § 301(a). By addressing whether state courts could also assert jurisdiction in such cases, the Court implicitly recognized that federal courts already possessed the same authority under § 301 to entertain declaratory judgment suits over the existence of a bargaining agreement. *See Dowd Box Co.*, 368 U.S. at 511 ("The clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon federal district courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various states over contracts made by labor organizations.").

We are presented with nearly identical facts in this case. After commencing negotiations before expiration of an existing agreement, the UAW and Mack publicly announced a "tentative agreement" on April 23, 1987, and the UAW members ratified the new agreement.

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[9] Specifically, the union's complaint requested

> a judgment declaring that there existed a valid and binding collective bargaining agreement, for an order enjoining the company from terminating or violating, and for an accounting and damages.

Dowd Box Co., 368 U.S. at 504 (describing averments in the complaint).

When the UAW later refused to acknowledge the agreement as controlling, Mack filed suit in federal court seeking a declaratory judgment that "the April 23, 1987 Agreement with the International Union constitutes a valid and enforceable collective bargaining agreement. . . ." *See* Complaint at 24. Mack's request for relief is indistinguishable from the union's claim in *Dowd Box Co. Compare* n.3, *supra*, (Mack's complaint) *with* n.9, *supra*, (Dowd complaint).

If, as the UAW contends, § 301(a) does not confer jurisdiction to determine the existence of a contract, the Court in *Dowd Box Co.* would have had no occasion to reach the issue whether state courts could also possess jurisdiction in such cases. Moreover, the Court has recently applied the *Dowd Box Co.* analysis in discussing the distinction between the respective roles of the federal courts and the NLRB. In *Plumbers & Pipefitters v. Plumbers & Pipefitters*, 452 U.S. 615, 626 (1981), the Court recognized the "obvious and substantial difference" between the NLRB's substantive regulation of internal union affairs and the "enforcement by the federal courts of freely entered into agreements. . . ." In discussing the issue of federal court jurisdiction, the Court reaffirmed the principle that "*enforcement* of [a collective bargaining agreement] should be left to the usual processes of the law and not to the National Labor Relations Board." *Id.* (emphasis in original) (quoting H.R. Rep. 510 at 42; *Teamsters Local, 174 v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962) (citing *Dowd Box Co.*, 368 U.S. at 513)).

Finally, prior decisions of this court do not support the UAW's view that a district court lacks jurisdiction under § 301 to determine the existence of a collective bargaining agreement. In *Leskiw v. Local 1470, International Bhd. of Elec. Workers*, 464 F.2d 721 (3d Cir.), *cert. denied*, 409 U.S. 1041 (1972), we held a district court lacked jurisdiction under § 301 unless the plaintiff

alleges a violation of a collective bargaining agreement. *Id.* at 723. We distinguished between suits for "a violation *of* a collective bargaining agreement" and suits for "an alleged violation *by* a labor contract" of rights that employees already possessed under a pre-agreement "'contract of hire.'" *Id.* (quoting *Adams v. Budd Co.*, 349 F.2d 368, 369-70 (3d Cir. 1965) (emphasis in original)). We held that a party cannot invoke § 301 jurisdiction by alleging that the contract itself constituted a violation by conflicting with other pre-existing rights. *Accord Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 962 (3d Cir. 1980) (no jurisdiction under § 301 because plaintiff's claim was independent of the contract, and did not involve a violation of rights arising under a collective bargaining agreement). In *Leskiw*, we did not address the issue whether § 301 grants jurisdiction for courts to decide whether a contract exists.[10]

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[10] We recognize that some courts of appeals have read the language of § 301 as barring jurisdiction to address this question, *see, e.g., A.T. Massey Coal Co. v. Int'l Union*, 799 F.2d 142, 146 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 1964 (1987); *NDK Corp. v. Local 1550*, 709 F.2d 491, 492-93 (7th Cir. 1983); *Hernandez v. Nat'l Packing Co.*, 455 F.2d 1252, 1253 (1st Cir. 1972), but we disagree with those holdings.

In *A.T. Massey Coal Co.*, for example, the Fourth Circuit considered a consolidated appeal in which one district court had declined to assert jurisdiction over whether a contract existed in a suit filed by an employer, and another district court asserted jurisdiction under the same facts in a suit filed by the union. The court held that under § 301 a district court had no jurisdiction to consider an employer's claim that it was not bound by an agreement because no contract existed. The court then concluded, however, that the second district court had § 301 jurisdiction to consider the union's claim that the employer was bound by the same agreement. 799 F.2d at 146. This view fails to articulate a legal basis to justify jurisdiction in the union case, but not in the employer's case.

The Courts of Appeals for the Seventh and First Circuits, meanwhile, merely concluded that the plain language of § 301 bars jurisdiction to consider a suit concerning the existence of a col-

Accordingly, we conclude that § 301(a) confers jurisdiction on a district court to determine the existence of a collective bargainng agreement.

III.

The UAW also maintains that notwithstanding subject matter jurisdiction under § 301, the district court is barred from deciding this case because the same dispute is pending under the mandatory grievance procedure in the 1984 agreement, which the UAW invoked when it filed a grievance on July 2, 1987. Thus, the UAW contends that Mack has failed to exhaust its contractual remedies.

Under Article 32, section 2 of the 1984 agreement, negotiations for modification or amendment of the agreement are not binding unless those changes have been reduced to writing and signed by designated parties. Article 5 of the 1984 agreement provides for an exclusive grievance procedure for all employee disputes involving contract interpretation. The UAW maintains

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lective bargaining agreement. *See NDK Corp.*, 709 F.2d at 492-93; *Hernandez*, 455 F.2d at 1253.

Other courts have disagreed. *See, e.g., Rozay's Transfer v. Local Freight Drivers, Local 208*, No. 86-6544, slip op. at 7489 (9th Cir. June 24, 1988); *McNally Pittsburg, Inc. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 812 F.2d 615, 617-19 (10th Cir. 1987); *Board of Trustees v. Universal Enter.*, 751 F.2d 1177, 1184 (11th Cir. 1985); *United Steelworkers of Amer. v. Rome Indus., Inc.*, 437 F.2d 881, 882-83 (5th Cir. 1970). In *McNally*, for example, the court held that § 301 grants a district court jurisdiction to consider whether a labor contract exists because the statute's dual purposes "to promote industrial peace and develop uniform law, demand that the statute be construed broadly." 812 F.2d at 617-19.

Although we agree with those authorities that have upheld jurisdiction in the district court to decide the existence of a labor contract, we prefer to rest our conclusion on the analysis set forth in text, *supra* Part II-C.

that its grievance alleges that Mack unilaterally implemented modifications to the 1984 agreement, in violation of Article 32. Because this grievance awaits arbitration, the UAW contends that Article 5 bars Mack from bringing suit in the district court.

On its face, the UAW's July 2 grievance seems to challenge Mack's implementation of the new agreement.[11] It does not implicate Article 32 of the 1984 agreement.[12] Because Article 32 governs negotiations to modify or amend the 1984 agreement, it does not apply to the negotiations conducted in April, 1987, which were directed only to the creation of a new labor contract. Moreover, the grievance procedure under Article 5 governs employee disputes only, under the interpretation of the 1984 agreement. It dos not bear on the existence of a new agreement.

Thus, Article 5 of the 1984 agreement is an employee-oriented grievance procedure and as such, the grievance procedures set forth in that Article apply solely to grievances by union members and not grievances by Mack.[13] The district court could not have been deprived

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[11] For the text of this grievance, see *supra* note 2.

[12] In a draft submitted to Mack on May 1, 1987, the UAW expressed its understanding of the parties' intent:

> Notwithstanding Article 32 of the Master Shop, Office and Engineering Agreements [*i.e.*, the 1984 agreement], the New Agreement will have an effective date of 12:01 a.m., May 4, 1987 . . . ."

App. at 1114. The UAW first raised Article 32 as a bar to the new agreement's enforceability in a letter to Mack dated July 6, 1987—four days after the UAW had filed its grievance. App. at 751.

[13] Article 5 provides in relevant part:

> In the event that any employee has a grievance or any group of employees have a grievance, the employee having such grievance or the group having a grievance or a designated member thereof shall, before a written grievance is filed pursuant to Section 2 below, take up the grievance in the following manner: . . . .

of jurisdiction purely on the basis of a grievance procedure aimed at resolving employee grievances. As a result, the UAW's argument that Mack should "exhaust contractual remedies" before bringing an action under § 301 is meritless. *See Lehigh Portland Cement Co. v. Cement Lime, Gypsum & Allied Workers Division*, 849 F.2d 820, 822-23 (3d Cir. 1988).

For these reasons, we conclude that the mandatory grievance procedure under the 1984 agreement did not bar this action in federal court.

IV.

After deciding that it had jurisdiction to hear this case, the district court concluded: "A new master collective bargaining agreement exists between Mack and the Union effective May 4, 1987, until November 3, 1992. The terms of this master gargaining agreement are set forth in plaintiff's exhibit 80 as modified by this opinion and by the record in this case." 671 F. Supp. at 1036.[14]

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[14] In its opinion, the district court summarized the essential elements of the agreement as set forth in Mack's exhibit 17, a report prepared on April 24, 1987, by Walter Meck, a Mack official and negotiator, for the members of Mack's Board of Directors:

> (a) A five and one-half year term, effective immediately following ratification;
>
> (b) A commitment by Mack that during the term of the new master agreement it will not close any existing facilities at which work is being performed by members of the Union (other than the previously announced closing of the Allentown assembly division);
>
> (c) The assignment to Mack's Macungie facility of its complete knockdown operations and the assembly of all of its cab over engines models, its glider kits, and the "Baby 8" model;
>
> (d) No further outsourcing by Mack during the term of the agreement;

[Continued]

We review this determination under a mixed standard. To the extent the district court made factual findings on the terms of the contract, we cannot disturb those findings unless they are clearly erroneous. To the extent

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[14] [Continued]

(e) The implementation by Mack of its five year capital investment program of $22,000,000 for the Macungie assembly division and $100,000 for the Hagerstown power train division;

(f) The company's consent to fund and implement the special early retirement benefits program as defined in the 1984 master agreement, as to all eligible Mack union employees;

(g) The maximum term of health care benefits currently provided to laid off employees to be extended from 13 months to 24 months for Mack's active union employees laid off as a result of the previously announced closing of the Allentown assembly division and the outsourcing of miscellaneous machining and carriers at the Hagerstown power train division;

(h) A reduction of $.85 to $1.10 per hour to be made to the wage rate schedule;

(i) Productivity improvements of up to twenty percent (20%) to be implemented at Macungie, effective on the date of the start up of the "Baby 8" model or January 4, 1988 (whichever is later), and Hagerstown, effective June 8, 1987;

(j) Job security guarantees for members of Local 677's engineering unit and the placement of the proposed centralized computer center in the Lehigh Valley, if constructed during the term of the new master agreement;

(k) The creation of a Protected Employee Group ("PEG") program, replacing the current Mack Income Security ("MIS") Program, with a $33,000,000 "bank" of funds to be used to offset the impact of future events such as improved methods of doing business, new technology and market turndowns exceeding ten percent (10%) of PEG employment levels (such levels to exclude the impact of 5C and other plant closings, Hagerstown outsourcing, productivity improvement improvements, and the higher than normal current employment levels due to the strike bank and current market conditions [sic];

(l) The grievances concerning employee transfer to Winnsboro and the Union's entitlement to automatic recognition at Winns-

[Continued]

the court selected or interpreted legal principles, our review is plenary. *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 103 (3d Cir. 1981).

A.

In determining whether a collective bargaining agreement exists, courts must look to federal labor relations law, not state contract law. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985); *Lincoln Mills*, 353 U.S. at 451. In order to reach a labor agreement, the parties must establish a meeting of the minds, *see Bobbie Brooks, Inc. v. International Ladies' Garment Workers' Union*, 835 F.2d 1164, 1168 (6th Cir. 1987), and demonstrate that the parties agreed on the substantive terms and conditions of the contract. *New York-Keansburg-Long Branch Bus Co.*, 578 F.2d 472, 477 (3d Cir. 1978).

In the field of labor relations, the technical rules of contract law do not determine the existence of an agreement. *See John Wiley & Sons, Inc. v. Livingston*, 376

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[14] [Continued]

boro to be subject to an "accelerated" arbitration process on May 5th and 6th, 1987;

(m) Certain supplemental unemployment benefits claims, currently unfunded, to be funded;

(n) Scheduled pension increases to occur during the term of the new contract;

(o) The scheduling of wage improvements of $.15 per hour effective January 1, 1990, 1991, and 1992;

(p) A health care cost containment program to be implemented as quickly as possible;

(q) Group insurance benefits to be improved throughout the term of the contract;

(r) A program of company funded lump sum payments to be established in return for voluntary terminations of employment.

671 F. Supp. at 1029-30. The opinion also listed several revisions to which both parties had agreed. *See id.* at 1035-36.

U.S. 543, 550 (1964); *Bobbie Brooks*, 835 F.2d at 1168; *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981). Adoption of an enforceable labor contract does not depend on the reduction to writing of the parties' intention to be bound. *Bobbie Brooks*, 835 F.2d at 1168;[15] *American Fed'n of Television & Radio Artists v. Inner City Broadcasting Corp.*, 748 F.2d 884, 887 (2d Cir. 1984); *Trustees of Atlantic Ironworkers, Local 387 Pension Fund v. Southern Stress Wire Corp.*, 724 F.2d 1458, 1459 (11th Cir. 1983); *Kaylor v. Crown Zellerbach, Inc.*, 643 F.2d 1362, 1367 (9th Cir. 1981); *New York-Keansbury-Long Branch Bus Co.*, 578 F.2d at 477. Instead, courts look to the surrounding circumstances and to the parties' "conduct manifesting an intention to abide by agreed-upon terms." *Bobbie Brooks*, 835 F.2d at 1168 (citing *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 355-56 (5th Cir. 1981) (en banc)); *see also Operating Eng'g Pension Trust v. Gilliam*, 737 F.2d 1501, 1504 (9th Cir. 1984). The parties' objective intent to create a contract is relevant—not their subjective beliefs. *See Warehouseman's Local No. 206 v. Continental Can Co.*, 821 F.2d 1348, 1350 (9th Cir. 1987).

B.

The UAW contends that it never reached an agreement with Mack, and therefore that the district court erred in finding a meeting of the minds. After reviewing the record, we conclude that the court correctly found that the parties entered into a new collective bargaining agreement.

From the time of the conclusion of the Crystal City negotiations, the UAW's conduct demonstrated a meeting

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[15] Indeed, in *Bobbie Brooks*, the employer brought a § 301 declaratory judgment action to determine whether a collective bargaining agreement existed. *See Bobbie Brooks, Inc. v. International Ladies' Garment Workers' Union*, 108 Lab. Cas. 10,315 (CCH) (6th Cir. 1987). The Sixth Circuit reached the merits without discussing a potential jurisdictional problem concerning the propriety of district courts hearing such suits under § 301.

of the minds on the new labor agreement. In the early morning hours of April 23, 1987, Usery and representatives for Mack and the UAW ended the bargaining session with a "handshake meeting," congratulated each other on reaching a new agreement, and discussed forthcoming ratification plans. As the district court found, such conduct generally signifies the culmination of an agreement. *See, e.g., Bobbie Brooks*, 835 F.2d at 1169 (agreeing with district court's reasoning that the "tone and temperament of the parties at the conclusion of the . . . meeting suggested that a binding agreement had been reached . . . .").

More significantly, on May 3, 1987, an overwhelming majority of the affected UAW members voted to ratify the new agreement. Union ratification is generally considered to be "the last act necessary . . . to create a meeting of the minds and an enforceable agreement." *NLRB v. Deauville Hotel*, 751 F.2d 1562, 1569 n.10 (11th Cir. 1985); *see also NLRB v. Southern Fla. Hotel*, 751 F.2d 1571, 1581 n.14 (11th Cir. 1985) (parties created an enforceable contract upon rank-and-file ratification, even though document provided it would become valid upon execution).

After ratification, there was a compelling sign of accord at the televised press conference in Allentown on May 4, 1987, where Governor Casey, along with representatives of Mack and the UAW, publicly announced the formation of a new agreement. Officials of the UAW stated unequivocally that they had entered into a new labor agreement with Mack. Tom Natchuras, the International UAW's Regional Director, praised the contract's emphasis on employee participation:

> Here at Mack Truck we have in the agreement a provision for employee involvement and we will work at that very earnestly. We will couple the skills, knowledge, resources of the management personnel

> along with the skills, knowledge and resources of the men and women in the bargaining unit and together I'm sure that a year or so from now we will look back at this day and say I'll be darned, we really did it.

App. at 1081 (transcript of press conference). Kim Blake, president of UAW Local 677, thanked the International UAW for its involvement in the negotiating process:

> [W]e never lost sight of the fact that we couldn't do it without the International. We missed out on the boat in the January discussions and came up with a better agreement. . . . So I think this is the beginning of a new relationship with Mack and the UAW . . . .

App. at 1083-84. In response to a reporter's questions, Blake expressed his satisfaction with the terms of the new contract:

> [T]he most complimentary thing that was said to us was by Bill Usery who told us this was one of the best, if not the best, labor agreement in the country with regard to job security and that's got to be the No. 1 issue in any job marketplace.

App. at 1096-97. Thus, the ratification vote, supported by the words and conduct of UAW officials, provide overwhelming evidence that the parties reached a meeting of the minds as of April 23, 1987.

The UAW contends that notwithstanding this evidence, the district court erred in finding that the parties reached an agreement. First, the UAW points out that the court itself recognized that a dispute remained as to "whether certain step increases in pension benefits are to apply to persons who retire after January 1, 1987, or only to those who retire after January 1, 1988." 671 F. Supp. at 1035. The court directed the parties to "nego-

tiate this issue in good faith." Id. The UAW contends this holding was internally inconsistent and violated the policies underlying the NLRA.

It is true that, as a general matter, "a contract does not arise if the union and management have not resolved a dispute over a substantive term." *Bobbie Brooks*, 835 F.2d at 1168. In this case, however, the parties never discussed the issue of step increases in pension plans during the negotiations at Crystal City. *See* 671 F. Supp. at 1035. The dispute over that term never arose until trial. Moreover, the district judge found that this provision was not a "material," "essential," or "operative" term of the agreement. *Id.* We have no reason to overturn this factual finding. Where a new contract is not contingent upon resolution of a specific issue, that issue does not require resolution before a collective bargaining agreement can be formed. *See Georgia Kraft Co., Woodkraft Div. v. NLRB*, 696 F.2d 931, 937 (11th Cir. 1983), *vacated in part on other grounds*, 466 U.S. 901 (1984).

The UAW also argues that substantial differences between the parties after the ratification vote prove the absence of agreement. In particular, the UAW cites a document prepared by Mack and submitted to the UAW on June 2, 1987, entitled "Subject Areas of Disagreement." App. at 2000-04. The UAW maintains that this document reveals differences between the parties as to the substantive terms negotiated in Crystal City.

In its opinion, the district court comprehensively addressed these contentions. First, it resolved several minor disputes that did not affect the validity of the new agreement. For example, the parties initially disagreed over the date of observing Martin Luther King's birthday, but at trial they agreed to observe it on the designated national holiday. 671 F. Supp. at 1034 n.3. In addition, the court retained in the new agreement the UAW's proposed guidelines regarding the quality of

worklife. Id. at 1035. The court also found that disagreements over other issue did not involve substantive differences, but rather concerned contract language or attempts to modify the new agreement. For example, at trial the parties disagreed over the interpretation of the language governing the funding of Mack's supplemental unemployment benefit plan. The court ordered the parties to resolve that dispute through the grievance and arbitration procedures. More importantly, the court found that the language disputes involving the UAW's greatest concerns—outsourcing and continued production at certain sites—should be resolved in favor of the UAW. 671 F. Supp. at 1035.[16] The fact that the parties

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[16] Mack has filed a motion under Fed. R. Civ. P. 60(a) to remand to the district court for clarification of the record because of certain inconsistencies between the district court's October 9, 1987 order and its October 26, 1987 opinion. Under Rule 60(a), a court may correct "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission . . . ."

In its October 9 order, the court stated that the UAW's exhibit 7, as modified, would govern outsourcing and transfer of work. In its October 26 opinion, however, the court cited Mack's exhibit 23 as controlling. Because these exhiibts contain some inconsistencies, the discrepancy between the order and the opinion involves more than a clerical mistake and is therefore outside the scope of Rule 60(a). *See Jones v. Anderson-Tully Co.*, 722 F.2d 211, 212 (5th Cir. 1984); *Gilbreth Int'l Corp. v. Lionel Leisures, Inc.*, 645 F. Supp. 732, 734 (E.D. Pa. 1986) (Rule 60(a) errors "must be mechanical in nature, apparent on the record and not involve and error of substantive judgment."). We therefore will deny Mack's motion.

It may be possible, however, to resolve these discrepancies under Fed. R. Civ. P. 60(b)(1) particularly since the issue raised is collateral to the question whether a new agreement came into existence—an issue that we have resolved on this appeal. The Advisory Committee Note to the 1946 amendment to Rule 60(b) explains that Rule 60(b)(1) permits relief based on the mistake or inadvertence of others, including the court itself. Thus, if either party or both of them so desire, there is nothing to prevent Mack or the UAW from proceeding before the district court under Rule 60(b)(1).

later attempted to modify the terms of the new contract does not mean that they never reached a binding agreement. *See Granite State Distrib., Inc.*, 266 N.L.R.B. 457, 461 (1983) (Subsequent efforts to modify terms are "in no way inconsistent with the existence of the previously arrived-at agreement. It is not unusual for parties to an agreement to discuss its terms, or even to seek modification thereof, after the agreement has been arrived at.").

IV.

For the foregoing reasons, we hold that the district court had subject matter jurisdiction to consider this case, and that the grievance and arbitration procedure under the 1984 agreement did not bar Mack's claim. We also hold that the court correctly found that a new collective bargaining agreement existed between the parties. Accordingly, we will affirm the judgment of the district court.

Costs taxed against appellant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1650

MACK TRUCKS, INC.

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,
International Union, UAW,
Appellant

(D.C. Civ. No. 87-4379)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and COWEN, *Circuit Judges.*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not

having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ [Illegible]
Circuit Judge

Dated: Oct. 11, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1650

MACK TRUCKS, INC.

v.

INTERNATIONAL UNIONS, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,
International Union, UAW,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civ. No. 87-4379)

Present: HUTCHINSON, SCIRICA and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel April 12, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 13, 1987, be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Invros
Clerk

September 12, 1988

Costs taxed in favor of the appellee as follows:

BRIEF $154.98

Certified as a true copy and issued in lieu of a formal mandate on October 19, 1988

Test: /s/ Sally Invros
Clerk, United States Court of Appeals
for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 87-4379

MACK TRUCKS, INC.

v.

INTERNATIONAL UNIONS, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

OPINION

October 26, 1987

CAHN, J.

Plaintiff Mack Trucks, Inc. (hereinafter "Mack") brought the instant action pursuant to 28 U.S.C. § 2201 seeking declaratory relief against the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (hereinafter "Union"). The matter was heard without a jury. After extensive oral argument I entered a final order. This opinion is filed to explain the rationale for the final order.

I make the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.

FINDINGS OF FACT

1. Mack is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in Allentown, Lehigh County, Pennsylvania. Mack manufactures heavy duty trucks and is engaged in an industry affecting interstate commerce.

2. The Union is a labor organization maintaining its principal office at Solidarity House, 8000 East Jefferson Avenue, Detroit, Michigan. Union's members are employees in an industry affecting interstate commerce.

3. Mack and the Union were parties to a master collective bargaining agreement ("the 1984 master agreement"), effective from October 30, 1984, until October 20, 1987. The 1984 master agreement covers Mack employees in bargaining units represented by four local unions: Local 677 in Allentown and Macungie, Pennsylvania; Locals 171 and 1247 in Hagerstown, Maryland; and Local 229 in Somerset, New Jersey.

4. On February 24, 1987, the Union's executive board rejected agreements Mack had negotiated with Locals 677, 171, 1247, and 229. The agreements between Mack and the Local Unions contained provisions for job security for Union employees of Mack.

5. Efforts by Mack and the Union to negotiate a new master collective bargaining agreement to take effect October 20, 1987, continued through April 8, 1987, but failed to materialize as of that date.

6. In early April, 1987, Mack and the Union agreed to mediate their differences with the assistance of W.J. Usery, Jr., a former Secretary of Labor in the Cabinet of the President of the United States.

7. At Mr. Usery's request, representatives of Mack and the Union met in Crystal City, Virginia, from April 18, 1987, to April 23, 1987.

8. On or about April 20, 1987, representatives of Mack presented a modified proposal to the Union.

9. After intensive negotiations, in the early morning hours of April 23, 1987, Mack and the Union reached agreement on the terms of a new master collective bargaining agreement. The agreement between Mack and the Union was oral and culminated with a shaking of hands by the negotiators for each side.

10. On April 24, 1987, Walter Meck, a Mack official and negotiator, on the basis of his participation in the Crystal City negotiations, prepared a letter and summary of the key elements (plaintiff's exhibit 17) of the new master agreement for transmittal by John Curcio, Mack's Chief Executive Officer, to the members of Mack's Board of Directors.

11. The key elements of the new master agreement as set forth in plaintiff's exhibit 17 are as follows.

(a) A five and one-half year term, effective immediately following ratification;

(b) A commitment by Mack that during the term of the new master agreement it will not close any existing facilities at which work is being performed by members of the Union (other than the previously announced closing of the Allentown assembly division);

(c) The assignment to Mack's Macungie facility of its complete knockdown operations and the assembly of all of its cab over engines models, its glider kits, and the "Baby 8" model.

(d) No further outsourcing by Mack during the term of the agreement;

(e) The implementation by Mack of its five year capital investment program of $22,000,000 for the Macungie assembly division and $100,000,000 for the Hagerstown power train division;

(f) The company's consent to fund and implement the special early retirement benefit program as defined in the 1984 master agreement, as to all eligible Mack union employees;

(g) The maximum term of health care benefits currently provided to laid off employees to be extended from 13 months to 24 months for Mack's active union employees laid off as a result of the previously announced closing of the Allentown assembly division and the outsourcing of miscellaneous machining and carriers at the Hagerstown power train division;

(h) A reduction of $.85 to $1.10 per hour to be made to the wage rate schedule;

(i) Productivity improvements of up to twenty percent (20%) to be implemented at Macungie, effective on the date of the start up of the "Baby 8" model or January 4, 1988 (whichever is later), and Hagerstown, effective June 8, 1987;

(j) Job security guarantees for members of Local 677's engineering unit and the placement of the proposed centralized computer center in the Lehigh Valley, if constructed during the term of the new master agreement;

(k) The creation of a Protected Employee Group ("PEG") Program, replacing the current Mack Income Security ("MIS") Program, with a $33,000,000 "bank" of funds to be used to offset the impact of future events such as improved methods of doing business, new technology and market turndowns exceeding ten percent (10%) of PEG employment levels (such levels to exclude the impact of 5C and other plant closings, Hagerstown outsourcing, productivity improvements, and the higher than normal current employment levels due to the strike bank and current market conditions;

(l) The grievances concerning employee transfer to Winnsboro and the Union's entitlement to automatic

recognition at Winnsboro to be subject to an "accelerated" arbitration process on May 5th and 6th, 1987;

(m) Certain supplemental unemployment benefits claims, currently unfunded, to be funded;

(n) Scheduled pension increases to occur during the term of the new contract;

(o) The scheduling of wage improvements of $.15 per hour effective January 1, 1990, 1991, and 1992;

(p) A health care cost containment program to be implemented as quickly as possible;

(q) Group insurance benefits to be improved throughout the term of the contract;

(r) A program of company funded lump sum payments to be established in return for voluntary terminations of employment.

12. With the exception of the items mentioned in the preceding paragraphs and certain additional items set forth in the discussion of legal issues below, in all other significant respects, the provisions of the 1984 master agreement were carried forward into the new master agreement.

13. As of April 23, 1987, all that remained to be done in order to complete the collective bargaining process was to obtain ratification from union members acting through their locals and to reduce the new master agreement to a written contract.

14. In order to inform the membership of pertinent contract provisions, the local unions, based upon information provided by the Union, prepared written summary sheets of the new provisions. Copies of the summaries were distributed or posted at the Allentown, Macungie, and Hagerstown locations prior to the May 3, 1987, ratification meetings.

15. The summaries (plaintiff's exhibits 22 and 23) are consistent with the key elements of the new master agreement set forth in Finding of Fact No. 11 and contain the specific wage and benefit terms which were agreed upon.

16. A majority vote of Mack's employees covered by the 1984 master agreement was required to ratify the new master agreement.

17. In Allentown, the new master agreement was ratified by a vote of 1362-303.

18. In Hagerstown, the new master agreement was ratified by a vote of 736-81.

19. In Somerset, the new master agreement was ratified by a vote of 29-12.

20. On May 4, 1987, Governor Casey of Pennsylvania convened a press conference to announce the new master agreement. Mr. Usery, the mediator, and a union representative who attended the press conference also confirmed that a new master agreement had been reached. Although the Hagerstown office workers did not vote on ratification of the new master agreement, there were fewer than 100 office employees at Hagerstown and, therefore, a majority of Mack union employees, voted in favor of ratification.

21. The technique Mr. Usery used to secure the agreement between Mack and the Union involved the concept of a "carve out" of a dispute between the parties relating to Mack's new plant at Winnsboro, South Carolina. This concept involved:

(a) An identification by Mr. Usery that the problems relating to automatic recognition of the Union by Mack at the Winnsboro facility were incapable of being negotiated. Nor could the parties negotiate the rights of union employees to transfer employment to the Winnsboro fa-

cility from the Allentown, Macungie, and Hagerstown facilities;

(b) Mr. Usery obtained the consent of the parties to carve out of the mediation process the automatic recognition and transfer rights issues;

(c) The parties agreed that those issues would be resolved by a reference to a labor arbitrator with the understanding that the decision of the arbitrator would be final, binding, and not subject to appeal. It was also contemplated that the arbitrator would render a prompt "bench" decision;

(d) With the Winnsboro issues carved out of their dispute, the parties were able to reach agreement on the other issues before them in regard to the new master agreement;

(e) The arbitration was to be held as soon as practicable and pending grievances were to be used to present the issues to the independent arbitrator.

22. On June 19, 1987, the arbitrator issued his award. He held that Mack was not automatically required to recognize the Union at Winnsboro but that laid off or displaced Mack employees had transfer rights to the Winnsboro facility which superseded the rights of any new employees Mack might hire for work at that plant. In his award, the arbitrator observed:

> ". . . Mack and the UAW entered into a 5½ year master contract to replace the existing one. The new contract is to be effective from May 4, 1987, until November 3, 1992."

23. From April 23, 1987, to June 19, 1987, the parties were involved in the process of memorializing their oral agreement in a written document. As of June 19, 1987, the parties had not completed this task.

(a) Following the receipt of the arbitration award, the Union did not act reasonably, properly, or promptly to complete the task of reducing the oral agreement to writing;

(b) Mr. Collins, a Union negotiator, admitted in his testimony that as a result of the Winnsboro arbitration award and problems with the company regarding the implementation of that award, the Union would not complete the task of drafting the contract language for the agreement reached at Crystal City, Virginia.

24. On July 6, 1987, the Union took the position that no new collective bargaining agreement existed until reduced to writing and that no "meeting of the minds" took place at the mediation held in Crystal City, Virginia.

25. Pursuant to the terms of the new master agreement, Mack:

(a) Participated in the accelerated arbitration of the Winnsboro issues;

(b) Began to implement the provisions referred to in paragraph 11 including making substantial capital expenditures to continue operating the Hagerstown and Macungie facilities during the 5½ year term of the new master agreement.

26. The Union's refusal to complete the process of reducing the new master agreement to writing was designed to exert pressure on Mack in regard to the Winnsboro issues and did not arise from any disagreement as to what had been agreed upon at Crystal City.

DISCUSSION

As a preliminary matter, this court must determine whether it has subject matter jurisdiction over the controversy. The Union contends that it does not, relying primarily on the language of § 301(a) of the Labor

Management Relations Act, 1947, as amended, 29 U.S.C. §§ 141-187 (1982), which states that federal district courts shall have jurisdiction over "[s]uits for *violation* of contracts between an employer and a labor organization", 29 U.S.C. § 185(a) (1982) (emphasis added). Asserting that no "violation" of the new master agreement has been alleged, and that no breach has in fact occurred, the Union argues that this case falls outside of the jurisdictional grant of § 301.[1] According to the Union, the essence of Mack's claim is that the Union has failed to reduce an oral collective bargaining agreement to writing. The Union argues that such a refusal, if it occurred, would constitute an unfair labor practice falling within the exclusive jurisdiction of the National Labor Relations Board. *See San Diego Bldg. Trades Council v. Garmon,*

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[1] The Union cites Leskiw v. Local 1470, IBEW, 464 F.2d 721 (3d Cir. 1972), *cert. denied*, 409 U.S. 1041 (1972), and Adams v. Budd Co., 349 F.2d 368 (3d Cir. 1965), to buttress its contention that § 301 confers jurisdiction on the federal courts over suits for *violation* of labor contracts. Properly read, however, these cases stand for the proposition that the federal courts have jurisdiction over suits for violation of *labor contracts*. In both *Leskiw* and *Adams*, the rights alleged to have been violated did not arise out of a "contract between an employer and a labor organization . . . or between any such labor organizations," but arose from a source separate and distinct from any such contract. It was upon this basis that the suits in each of these cases was dismissed for lack of jurisdiction.

It is clear that plaintiffs in both *Leskiw* and *Adams* alleged *violations* of certain rights. None of the rights that they alleged had been violated, however, were based on a labor contract. What is important for § 301(a) purposes is that the rights and duties arising from a collective bargaining agreement be at issue, either because it allegedly has been violated or because its existence is controverted. In neither *Adams* or *Leskiw* were the existence or terms of a collective bargaining agreement at issue. On the contrary, the question each of those cases presented was what effect a collective bargaining agreement, the terms and existence of which were undisputed, would have on rights separate from that agreement.

359 U.S. 236 (1959); 29 U.S.C. § 158(b)(3), (d) (1982) (defining unfair labor practices by a union).

The Union's position is unsound for several reasons. First, Mack has satisfactorily established a breach by the Union of the new master agreement.[2] The Union's letters dated July 6 and July 10, 1987, unequivocally express the Union's position that a new collective bargaining agreement had not been reached. I find that this denial constituted a clear breach by repudiation, or an "anticipatory breach," of the new master agreement. *See Restatement (Second) of Contracts* § 253 (1979); *see also id.* at comment d (noting availability of declaratory relief in order to "avoid harsh results").

Second, the Union's letters of July 6 and July 10, 1987 charge Mack with violating its obligations to the Union under the old agreement by unilaterally implementing the terms of the new collective bargaining agreement. While it is true that the availability of declaratory relief neither augments or diminishes federal jurisdiction, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950), one of the principal goals of the Declaratory Judgment Act is to allow a party, when uncertainty has been injected into a legal relationship, to have an adjudication clarifying its rights "without having to wait

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[2] Arguably no breach at all is required for § 301 jurisdiction. The Circuits are split on the issue of whether a breach is a condition precedent to the bringing of a suit under § 301. *Compare* United Steelworkers v. Rome Industries, Inc., 437 F.2d 881 (5th Cir. 1970) (allegation of breach not necessary) *and* Black-Clawson Co. v. International Ass'n of Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962) (same) *and* McNally Pittsburg, Inc. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 812 F.2d 615 (10th Cir. 1987) *with* NDK Corp. v. United Food and Commercial Workers, 97 Lab. Cas. (CCH) ¶ 10,222 (7th Cir. 1983) (no jurisdiction to determine validity of contract absent breach) *and* Alvares v. Erickson, 514 F.2d 156 (9th Cir.), *cert. denied*, 423 U.S. 874 (1975) (allegation of breach is element in stating a cause of action under § 301).

until his adversary should decide to bring suit, and to act at his peril in the interim." *Shell Oil Co. v. Frusetta*, 290 F.2d 689, 692 (9th Cir. 1961); *see also Berlitz School of Languages of America, Inc. v. Donnelly & Seuss, Inc.*, 84 F. Supp. 75, 77 (E.D. Pa. 1949). If a breach is essential to federal jurisdiction under § 301, a breach by either party is sufficient. *See Todd Shipyards Corp. v. Industrial Union of Marine and Shipbuilding Workers, Local 39*, 344 F.2d 107 (2d Cir. 1965). The Declaratory Judgment Act permits the party accused of breaching the agreement to seek a declaration of its rights and obligations under the agreement, without having to wait for the non-breaching party to bring an action to enforce the terms of the collective bargaining agreement.

Finally, a breach is not necessary to the maintenance of a declaratory judgment action under § 301 when the moving party is arguably subject to conflicting obligations under two or more different agreements. Judge Garth's opinion in *Jersey Cent. Power & Light Co. v. Local Union 327, IBEW*, 508 F.2d 687 (3d Cir. 1975), *vacated*, 425 U.S. 987, *on remand*, 542 F.2d 8 (1976) (reaffirming prior decision on jurisdictional issue), is persuasive on this point. The similarity of the facts in *Jersey Central* to the facts in the present case underscores the precedential value of that opinion. In *Jersey Central*, the Company planned to lay off a substantial number of employees. Before it had breached or had been accused of breaching its collective bargaining agreement, the Company sought a declaratory adjudication of the proper method to effectuate the planned cut-backs. Under its collective bargaining agreement, the Company was required to implement lay-offs on a strict seniority basis. Under a conciliation agreement with the EEOC, however, a layoff accomplished by seniority alone would arguably be prohibited. Because it was "[c]onfronted with two apparently conflicting contracts" the court held

that the Company had properly invoked the Court's jurisdiction.

The position Mack finds itself in is no different. It is faced on one hand with the right and the obligation to implement the terms of the new collective bargaining agreement, which it has begun to do. On the other hand, it has been told by the Union that a new collective bargaining agreement does not exist, that it must adhere to the terms of the old master agreement, and that the Union is "prepared to take economic action" on October 20, 1987, the date the old master agreement was scheduled to expire. Under these conditions, Mack is entitled to a declaratory judgment even in the absence of a discrete breach.

The entertainment of actions for declaratory relief rests within the sound discretion of the court. *Davis v. Romney*, 490 F.2d 1360, 1369-70 (3d Cir. 1974). I have exercised my discretion to proceed in this matter because the public interest is well served by the prompt resolution of the uncertainty that has surrounded Mack, its employees, and the economy of eastern Pennsylvania. In addition, this court takes cognizance of the public policy expressed by Congress in promoting labor peace and stability. *See* 29 U.S.C. § 141(b) (1982) (policy of LMRA is to avoid industrial strife). Moreover, in light of the fact that Mack had partially performed its obligations and in view of the imminence of October 20, I determined that a declaratory judgment would "avoid . . . the 'accrual of avoidable damages to one not certain of his rights.'" *ACandS, Inc. v. Aetna Casualty and Surety Co.*, 666 F.2d 819, 823 (3d Cir. 1981) (quoting *Dewey & Almy Chemical Co. v. American Anode, Inc.*, 137 F.2d 68, 69 (3d Cir.), *cert. denied*, 320 U.S. 761 (1943)). I reach this decision bearing in mind that the purpose behind the enactment of LMRA was twofold: to promote industrial peace and responsibility, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 454-55 (1957), and

to allow for the development of a consistent body of labor law, *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); and that in effectuating these purposes § 301 should be liberally interpreted, *Smith v. Evening News Ass'n*, 371 U.S. 195, 199-200 (1962).

On the merits of this case, the Union contends that no contract was formed between the parties because the parties had been unable to resolve several disputes with respect to the contractual language to be used to memorialize the agreement between them. To resolve this issue I turn for guidance to Judge Garth's opinion in *N.L.R.B. v. New York-Keansburg-Long Branch Bus*, 578 F.2d 472 (3d Cir. 1978). In that case, the National Labor Relations Board petitioned the Court of Appeals for the Third Circuit to enforce an order against an employer based upon a finding that the employer committed an unfair labor practice by refusing to execute a collective bargaining agreement after it had allegedly reached an oral agreement with the union.

The court refused to enforce the order because Judge Garth found no substantial evidence that an accord had been reached. In so doing, he enunciated several tests to determine whether a union and an employer had reached an actual agreement in regard to an alleged oral collective bargaining agreement. Judge Garth first opined that "[i]n the field of labor relations when the parties have agreed to the substantive terms and conditions of a contract, even though it may not be reduced to writing, they can nevertheless be held to its terms." 578 F.2d at 477.

The next focus of inquiry becomes whether, as a matter of fact, the union and the employer agreed on the material terms and conditions of the alleged collective bargaining agreement. If there is proof that the union and the employer agreed on the substantive terms of a collective bargaining agreement, then such an agreement becomes valid and binding on the parties. In examining

whether an agreement has been reached the court must look to federal labor relations law and not state contract law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) (questions relating to what the parties to a labor agreement agreed to are resolved by federal law). I find that there is no dispute on the vast majority of the provisions of the new master collective bargaining agreement.[3] Moreover, I find a substantial accord between the parties on all material terms of the new master agreement to have been reached at Crystal City.

Despite the manifest agreement the parties, there were several issues raised at trial that merit discussion. The most important issue relates to Mack's agreement not to outsource to any further extent components used in the manufacturing of its trucks, and to maintain the production of certain truck models at certain facilities.

The parties agree that it had been their intent at Crystal City that there would be no further outscoring during the terms of the new agreement. After Crystal City the parties disagreed on what language should be used to express this intent. I find that they did not disagree as to what precisely "no further outsourcing" meant. The Union has three concerns. First, the Union does not want the company to be able to circumvent its agreement and begin manufacturing replacement models at other manufacturing facilities merely by changing the model number or name. The Union has vigorously insisted that all replacement models be manufactured in the same facility where the precursor was manufactured. Second, while the company desires an Act of God exclusion to outsourcing in order to protect it from calamities such as fire or earthquakes, the Union wants to make

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[3] There were some minor disputes between the parties including whether or not Martin Luther King's birthday would be observed on the Friday before Labor Day or on the designated national holiday. At the trial it became clear that the parties' intent is to observe the holiday as scheduled in January.

sure that the Act of God concept cannot be utilized to justify outsourcing otherwise prohibited by the new master agreement. Third, Mack has proferred language which provides that the prohibition against outsourcing would not prevent the implementation of improved methods of doing business which might, in turn, reduce employment. The Union is concerned that outsourcing otherwise prohibited by the master agreement might be validated by the claim that outsourcing itself is an improved method of doing business.

In construing a collective bargaining agreement, a court should construe the agreement as a whole. *H.C. Lawton, Jr., Inc. v. Truck Drivers, Chauffeurs and Helpers Local 384*, 755 F.2d 324, 328 (3d Cir. 1985). In addition, as it is for all contracts, the intent of the parties is of paramount concern. The basis underlying the entire agreement between the parties is that the employees would make certain wage and benefit concessions in return for better job security. Absolutely essential to the Union's assent were the guarantees it received with respect to outsourcing and the continued production of certain models at their current manufacturing locations. Indeed, based upon the evidence presented at trial, I find that the Union would not have entered into the new collective bargaining agreement without these guarantees which were the *quid pro quo* for certain wage and benefit concessions.

Mack stated at trial that it no longer disagreed with the Union's understanding. Therefore, by agreement of the parties, I find that the language disputes involving outsourcing and the continued production of various models at certain locations should be resolved in favor of the Union. The method for achieving this resolution will be discussed below.

At trial, although there first appeared to be some dispute, the parties agreed that Sections 3 and 5 of Article

28 in Plaintiff's Exhibit 80 ("P-80") would not be part of the new master agreement. The subject areas covered by these sections have been superseded by the parties' understanding with respect to outsourcing and job security. In addition, the parties agree that the language used in drafting Mack's protected employee group ("PEG") plan should not be construed to undercut in any way the job security and outsourcing provisions contained in other parts of the agreement. Moreover, Mack agrees with the Union with respect to those objections to P-80 raised by John Collins in his letter of October 8, 1987 concerning the first and third pages of letter 8, the "grow-in" provision in letter 29, and the word "mutual" in letter 30.

The Union has submitted guidelines pertaining to the concept of quality of work life and the company has not seriously disagreed with them. The Union guidelines shall be included in the new master collective bargaining agreement.

Another issue that arose at trial concerned the funding of Mack's supplemental unemployment benefit ("SUB") plan. The parties agreed on the language that is to govern the plan, and Mack concedes that it is bound by that language. Because the parties disagree on how that language is to be interpreted, there is a dispute as to whether Mack has been properly funding the plan. This dispute should be resolved through the grievance and arbitration procedures.

The Union, on the last day of argument following the trial, contended that no agreement had ever been reached as to whether a PAYSOP would be established under the new agreement for bargaining unit employees. Mack responded that the parties had agreed that, as a result of the 1986 Tax Reform Act (which removes the provision authorizing PAYSOP's), this provision would be deleted from the new master agreement. The Union's counter-thrust was that the parties had agreed to estab-

lish some type of an alternative plan in lieu of a PAY-SOP. I find that the Union's position on this point is unreasonable, without a shred of evidence to support it, and was manufactured late in the trial in order to avoid a finding that there had been substantial agreement as to the terms of the new master agreement.

Finally, there is a dispute between the parties regarding whether certain step increases in pension benefits are to apply to persons who retire after January 1, 1987, or only to those who retire after January 1, 1988. This issue seems to have been passed over at Crystal City and therefore no meeting of the minds was reached with respect to it. I find however that this provision is not a "material" "essential" or "operative" term of the agreement. Persons who retire between January 1, 1987 and January 1, 1988 will receive a pension and an additional lump sum even under Mack's understanding. The only outstanding issue concern certain increases in lieu of the lump sum payment. Although these increases are immaterial to the agreement as a whole, they are not insignificant to the affected retirees and the parties are directed to negotiate this issue in good faith.

The Union has called to my attention no other disputes between it and Mack pertaining to the new master collective bargaining agreement. Consequently, I have no hesitancy in declaring this agreement to be in effect between the parties.

The final step is to ascertain exactly what document should be declared to be the master collective bargaining agreement between the parties. Mack has prepared plaintiff exhibit 80 ("P-80") which purportedly represents all of the agreed terms between the parties. I will declare P-80 as modified by this opinion to be the new master collective bargaining agreement between the parties, subject to the following exception: all matters pertaining to outsourcing and job security shall be controlled by the section entitled "Master Contract Modifications,"

paragraph 1 with subparagraphs (a) through (j) plus a final paragraph, of the memorandum of understanding submitted to the membership of Local 171 prior to the ratification vote by that local on the new master collective bargaining agreement (introduced at trial as plaintiff's exhibit 23).

I reach the following:

CONCLUSIONS OF LAW

1. This court has subject matter jurisdiction to adjudicate plaintiff's claim for declaratory relief pursuant to Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. §§ 141-187 (1982) and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1982).

2. A new master collective bargaining agreement exists between Mack and the Union effective May 4, 1987, until November 3, 1992. The terms of this master collective bargaining agreement are set forth in plaintiff's exhibit 80 as modified by this opinion and by the record in this case.

3. The refusal of the Union to reduce the master collective bargaining agreement to writing was unreasonable and in violation of law.

BY THE COURTS

/s/ Edward N. Cahn
EDWARD N. CAHN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 87-4379

MACK TRUCKS, INC.

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

ORDER

AND NOW, this 9th day of October, 1987, IT IS, following a lengthy bench trial and oral argument by counsel, ORDERED AND DECREED as follows:

1. Plaintiff's Exhibit 80 is declared to be the 1987 Master Collective Bargaining Agreement between the parties and is declared to reflect accurately the meeting of the minds of the parties reached at Crystal City, Virginia, on April 23, 1987, except as follows:

(a) Defendant Union's Exhibit 7, paragraphs 1 through 8 inclusive, shall control in regard to the parties' agreements pertaining to outsourcing and retention of work with the additional understanding that the "Baby 8" model will be received at Macungie in a semi-finished state (partially groomed cabs and frames with axels mounted);

(b) The concept of "improved methods of doing business" shall never be a justification for the plaintiff to

evade its agreements prohibiting outsourcing or transfer of work;

(c) The concept of "Act of God" shall not be utilized by plaintiff to evade its agreements prohibiting outsourcing or transfer of work;

(d) Sections 3 and 5 of Article 28 of Plaintiff's Exhibit 80 are hereby deleted from Plaintiff's Exhibit 80.

2. No meeting of the minds has been achieved by the parties on the issue of what enhanced pension benefits are available for employees who retire before January 1, 1988, but after January 1, 1987. The parties are directed to negotiate this issue in good faith.

3. A detailed opinion explaining the court's decision will be filed subsequently.

BY THE COURT:

/s/ Edward N. Cahn
EDWARD N. COHN, J.